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ALEXANDER L. STEVAS,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

McDONNELL DOUGLAS CORPORATION,
Petitioner,
v.
NORTHROP CORPORATION,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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July 18, 1983

QUESTIONS PRESENTED

1. In light of *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466 (1982), did the Ninth Circuit properly determine that a market division, historically held to be *per se* illegal, should nonetheless be subjected to a rule-of-reason analysis because the market division allegedly had some procompetitive effects, and neither the military aircraft industry nor teaming agreements effecting such a market division had been previously examined by the courts in a Sherman Act context?

2. Inasmuch as (a) the United States Government owns "unlimited rights" in the data and technology of the F-18 aircraft, which was designed and developed at its instance and expense, and controls who can produce and sell and who can buy and use the aircraft, and (b) the availability of the aircraft is vital to the Government's national defense and foreign policy interests, is the Government an indispensable party to this suit in which a contractor seeks determinations as to who can produce and sell F-18's to the Government for its own use or directly or indirectly through the Government for use by its allies, and in what configurations?

3. Is this suit, which requires judicial inquiry into the decisions of the Legislative and Executive Branches of the Government concerning the production, sale, purchase and use of the F-18 by or for the Government and its allies, and into the motivations of military procurement decisions of foreign states, nonjusticiable by reason of the political question and act-of-state doctrines?

4. Can a prime contractor unlawfully attempt to monopolize a military air weapons system market in which the production, sale, purchase, and use of the product are controlled by the Government?

STATEMENT REQUIRED BY RULE 28.1

This Petition is filed on behalf of McDonnell Douglas Corporation, which has no parent companies. It has direct or indirect equity interests in the following companies (in addition to its wholly owned subsidiaries):

American Monitor Corporation
Arinc, Incorporated
Coaliquid, Inc.
Coaliquid International, B.V.
Coaliquid International, Inc.
Coaliquid International, Ltd., N.V.
Excalibur Technologies Corporation
Muse Air Corporation
Nitron, Inc.
PSA, Inc.
Republic Airlines West, Inc.

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OPINION BELOW

The opinions of the Court of Appeals are published at 700 F.2d 506 and, as modified, at 705 F.2d 1030; the modified opinion is reproduced at p. 3a of the Appendix ("App.") hereto. The District Court's opinion published at 498 F. Supp. 1112, orders, and findings of facts and conclusions of law, which the Ninth Circuit reversed, appear at App. pp. 53a, 76a, 79a, 121a, 123a.

JURISDICTION

The Ninth Circuit's judgment and opinion was filed on February 28, 1983 (App. pp. 2a, 3a). A timely petition for rehearing and suggestions for rehearing *en banc* were denied by a June 10, 1983 order, a copy of which appears at App. p. 1a. This petition for certiorari is filed within 90 days thereafter. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions, regulations and rules are involved, all of which are set out at App. pp. 127a-132a: (1) Sherman Act, §§ 1 and 2, 15 U.S.C. §§ 1 and 2; (2) Defense Acquisition Regulation ("DAR") 4-117, 32 C.F.R. § 4-117; (3) DAR 9-201(d), 32 C.F.R. § 9-201(d); (4) DAR 9-301.2, 32 C.F.R. § 9-301.2; and (5) Rule 19, Fed. R. Civ. P.

STATEMENT OF THE CASE

A. Introduction

The subject of this precedent-setting action is this Nation's newest and most advanced aircraft weapons system, the F-18.

McDonnell Douglas Corporation ("McDonnell") is the prime contractor for the United States ("Government"), and Northrop Corporation ("Northrop") is McDonnell's principal subcontractor for the F/A-18A. The F/A-18A is the only F-18 which has been developed and is being produced. It is being procured from McDonnell by the Government for the U.S. Navy and the Air Forces of Australia and Spain and, with the

permission of the Government, by Canada for its Air Force. With the Government's preliminary approvals, Greece and Turkey, among others, are also considering procuring the F/A-18A.

Northrop initiated this suit to enforce its claim of exclusive rights to produce and sell (a) F-18's of any configuration for the U.S. Air Force, and (b) F-18's of any configuration for the Navy and foreign governments, other than the carrier suitable configuration being procured from McDonnell by the Navy for its own use—all in derogation of the Government's rights to make such determinations. Northrop admits that the Government has *bought and obtained from Northrop and McDonnell "unlimited rights"* in its data and technology.

Under any yardstick, the case involves questions of exceptional importance affecting the defense and foreign policy of the United States. The Ninth Circuit opinion, reversing the District Court decision, has, *inter alia*, the following consequences:

- (1) it sanctions agreements of private contractors which divide between themselves U.S. Air Force and Navy customers and, on product specific bases, all customers, in contravention of this Court's holdings in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466 (1982);

- (2) it emasculates the "unlimited rights" purchased by the Government to freely disclose in any manner and for any purpose whatsoever, and to freely use or have or permit others to use, F-18 data and technology, by effectively precluding the Government from exercising those "unlimited rights" to purchase or permit foreign governments to purchase F-18's from McDonnell as the Government determines to be in the interest of national defense and foreign policy;

- (3) it annuls DAR 4-117 (App. p. 130a), which proscribes "teaming arrangements" which (a) are in violation of the antitrust statutes, or (b) limit the Government's rights to "provide the selected prime contractor with data

rights, owned or controlled by the Government" or to "pursue its policies on competitive procurement, sub-contracting, and component breakout";

(4) it thrusts the judiciary into political questions and motivations behind acts of states which are inextricably entangled in this case; and

(5) it decides for the first time that a prime contractor could attempt to monopolize an advanced military air weapons system market which the Government controls.

B. Facts

1. Northrop's Commencement Of This Action

Northrop initiated this suit on October 26, 1979, with a three-count Complaint for a declaratory judgment and an injunction seeking:

(a) to preclude McDonnell from:

(i) producing and selling or offering to sell any F-18 to or for the U.S. Air Force;

(ii) producing and selling or offering to sell to the U.S. Navy any F-18 which is not "carrier-suitable";

(iii) producing and selling or offering to sell, directly or indirectly through the Navy for use by foreign governments, any F-18 which does not conform to the carrier-suitable F-18 configuration being purchased by the Navy; and

(b) to require McDonnell to subcontract certain F-18 work to Northrop on Northrop's unilaterally established terms and conditions, and to preclude McDonnell from subcontracting the work to others even if Northrop refused to do it.

After the District Court denied Northrop's motion for a preliminary injunction on December 3, 1979, Northrop filed an Amended Complaint (App. p. 147a) adding five counts alleging, respectively, fraud in the inducement, breach of fiduciary duty, attempted monopolization, unfair competition and *quan-*

tum meruit theories. In these counts it seeks essentially the same declaratory and injunctive relief, as well as damages.

Underpinning all eight Counts is Northrop's construction of the parties' October 2, 1974 Teaming Agreement (App. p. 132a) and June 27, 1975 Basic Agreement (App. p. 134a) and its contention that McDonnell has breached the Basic Agreement as so construed.¹ Under its construction, for which it seeks judicial sanction, Northrop claims that Northrop and McDonnell divided the market for F-18 aircraft such that Northrop would have the exclusive right to produce and sell all F-18's other than (a) carrier-suitable F-18's for the use of the Navy, and (b) F-18's for foreign customers of the same carrier suitable configuration as that being purchased by the Navy for its own use, which F-18's McDonnell would have the exclusive right to sell.

Northrop contends that this market division and the other "license" restrictions it seeks to impose on McDonnell (and *ipso facto* the Government) are justified by its alleged "proprietary rights" in YF-17 prototype and F-17 proposal data and technology and its earlier P-530 and P-630 paper designs which Northrop alleges it incorporated into the YF-17. It contends it "licensed" such data and technology to McDonnell under the Basic Agreement for use in designing the F-18.

2. The Teaming Agreement

In 1972 the Government awarded both Northrop and General Dynamics multimillion-dollar prime contracts independently to develop and build prototype demonstrators for the Air Force's Lightweight Fighter Technology Demonstration (la-

¹ Northrop admits that while it alleges different theories in the various counts, "virtually the same operative facts underlie each of Northrop's causes of action." As the Ninth Circuit itself recognized, "The conduct and relief at issue in Counts 4-8 overlap and are inextricably intertwined with that in Counts 1-3." 705 F.2d at 1039. See also District Court's Finding of Fact 9, App. p. 82a.

ter called the Air Combat Fighter, "ACF") Program. The Northrop and General Dynamics prototypes were denominated, respectively, the YF-17 and YF-16. Northrop and McDonnell entered into the October 2, 1974, Teaming Agreement after Congress, in September, 1974, directed that the Navy, in its proposed Naval Air Combat Fighter ("NACF", earlier called VFAX) program, make use of the YF-17 and YF-16 data and technology already bought by the Government.

Because neither the YF-17 nor the YF-16 met the Navy's VFAX requirements, and because neither Northrop nor General Dynamics had the experience to satisfy the Navy's requirements, the Government requested that both contractors enter into teaming arrangements pursuant to DAR 4-117 with companies which possessed the necessary experience and capabilities to design and build Navy aircraft.

In the two-page 1974 Teaming Agreement the parties simply agreed "to team for the purpose of developing, proposing and producing a USAF derivative of the YF-17 (USAF ACF) and a carrier-suitable version of the YF-17 (USN ACF) to satisfy U.S. Navy VFAX requirements." (App. p. 132a.) McDonnell was to be prime contractor on the NACF. The roles were to be reversed for the Air Force's ACF and for foreign variants of that aircraft. During the term of the Teaming Agreement, as requested by the Government and in performance of Northrop's F-17 proposal prime contract, Northrop provided the YF-17 and F-17 proposal data and technology to McDonnell without restriction for its use in designing an NACF aircraft.

3. The Basic Agreement

The Basic Agreement (App. p. 134a) was entered into by the parties after the January, 1975 Air Force selection of General Dynamics' proposed F-16 over Northrop's proposed F-17 for the Air Combat Fighter and after the Navy's May, 1975 selection of McDonnell's proposed F-18 for its Naval Air Combat Fighter.

The Basic Agreement, by its terms, superseded the earlier teaming agreement. In it, the parties agreed to:

work together (without in any manner intending to create a joint venture or otherwise incur or employ joint or several liability) for the purpose of obtaining and performing contracts for the development and production of derivatives of YF-17 aircraft that are responsive to the requirements of the U.S. Navy and foreign customers.

At the heart of the Basic Agreement are paragraphs 3 and 5:

Paragraph 3, "*Contract Responsibilities*," provided that McDonnell would be prime contractor for contracts for development and production of F-18 aircraft purchased by the Navy for its own use and for contracts for sale directly or indirectly through the Navy to foreign customers of F-18's of "basically the same configuration." It provided that Northrop could elect to be prime contractor for the development and production of other aircraft derived from the YF-17. (App. pp. 134a-135a.)

Paragraph 5, "*Division of Effort*," described how the work was to be divided under the contemplated McDonnell prime contracts, expressly recognizing the right of the Government—which Northrop now disregards—to direct otherwise. (App. pp. 135a-136a.)

The Basic Agreement does not purport to override any of the Government's rights. DAR 4-117.

4. Government's Procurement Of Unlimited Rights In All YF-17 (Including P-530 and P-630) and F-18 Data and Technology

It is an admitted fact that (a) under the Government's F-18 prime contracts with McDonnell, (b) through Northrop's F-18 subcontracts from McDonnell under those prime contracts, and (c) under the Government's previous YF-17 prototype and F-17 proposal prime contracts with Northrop, the Government has obtained "unlimited rights" in all of the data and technology of (a) the YF-17 prototype and F-17 proposal (including the incorporated P-530 and P-630 designs of Northrop) and (b) the F-18. The Government therefore has the right and means to freely disclose this data and technology for any purpose and to

freely permit its use by any contractor.² And, as the District Court and the Ninth Circuit recognized, the Government authorized McDonnell's use of all applicable YF-17 data in connection with the F-18 program. (705 F.2d at 1036; Finding of Fact 40, App. p. 92a.)

5. Government's Control Of Production, Sale, Purchase And Use Of The F-18

Even if, *arguendo*, McDonnell's alleged breaches of the Basic Agreement as construed by Northrop did occur, the unalterable, ultimate fact is that the Government controls who can produce and sell and who can buy and use the F-18.

Neither the Government nor any foreign government has selected Northrop's proposed land-based F-18's, denominated "F-18L's". The record and the Government's plenary control, by law, over advanced air weapons systems belies Northrop's claim that McDonnell's acts, rather than decisions of the Government and of foreign governments, have affected Northrop's efforts to sell F-18L's. For example:

—The Government refused to permit Northrop to release information on a proposed F-18L to any foreign country until the Navy, McDonnell, and Northrop jointly developed, and the Department of Defense approved, a detailed Foreign Military Sales Master Plan which assured that its development would not adversely impact the Navy's F/A-18A program.³

² In the District Court, Northrop initially challenged the Government's unlimited rights. After McDonnell's motion to dismiss, Northrop told the court that "Northrop does not allege—for purposes of this action—that the Government does not have unlimited rights to use YF-17 F-18A technical data." See, e.g., 498 F. Supp. at 1117 n. 4.

³ As a result of the Government's requirement for Foreign Military Sales Master Plans, McDonnell and Northrop entered into a third agreement on August 26, 1976. (App. p. 141a.) In that agreement, Northrop elected to design, develop, and produce aircraft derived from the YF-17 "designed *only* for land-based operations." The agreement specifically stated that "the foregoing election by [Northrop] is not in derogation of McDonnell's rights under the Basic Agreement." (Emphasis added.)

—President Carter's administration refused to permit the sale of the F-18L to Iran.

—President Carter's Directive No. 13 ("PD-13") declared that arms transfers would be viewed "as an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interest," and precluded export to non-exempt countries of advanced weapons not operationally deployed with U.S. forces or which were significantly modified solely for export. The then proposed F-18L fell within both these categories.

—Canada, exempted from PD-13, eliminated a Northrop proposed F-18L in its selection of a new fighter aircraft, stating that it was unwilling to assume the risks of (a) buying an aircraft not in the service of any other country, (b) involvement in the development and initial production of the plane, and (c) a delivery schedule later than it required.

—Additionally, Belgium, the Netherlands, Denmark, Norway, Australia, Spain, Turkey and Greece have eliminated F-17/F-18L's in selecting their next generation advanced air weapons systems from among those competing in the world market.

6. District Court Proceedings

After nearly a year of extensive discovery, affidavits, briefs and numerous hearings, the District Court dismissed Northrop's First Amended Complaint and McDonnell's Counterclaim, which it viewed as a mirror image of the Amended Complaint, on the grounds, among others, that the Government was an indispensable party, that the political question and act-of-state doctrines rendered the matter nonjusticiable, that the Basic Agreement as Northrop sought to have it construed was a *per se* illegal division of markets under the Sherman Act, and that McDonnell could not have the power to monopolize the market which the Government controls.

7. Proceedings On Appeal

The Ninth Circuit disagreed and reversed each of the District Court's holdings.

REASONS WHY THE WRIT SHOULD BE GRANTED

- I. The Ninth Circuit's Determination That An Obvious Market Division Should Be Subjected To A Rule-Of-Reason Analysis Under The Sherman Act Because Neither The Military Aircraft Industry Nor Teaming Agreements Have Received Judicial Scrutiny In A Sherman Act Context Is Repugnant To This Court's Decisions In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466 (1982), And *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

Within the past three years, this Court twice has admonished the Ninth Circuit that a rule-of-reason analysis is not to be applied to a *per se* violation of the antitrust laws. *Catalano, Inc. v. Target Sales, Inc.*, *supra*; and *Arizona v. Maricopa County Medical Society*, *supra*.

Despite this clear and controlling precedent, the Ninth Circuit in this case persisted in attempting to apply a rule of reason to a practice which has uniformly been held to be *per se* illegal—a division of markets between competitors. The District Court had found that:

The Basic Agreement and the August 26, 1976, Agreement, as Northrop would have this court construe and enforce them, constitute an allocation of markets between horizontal competitors, *per se* violative of Section 1 of the Sherman Act. Under Northrop's interpretation of those agreements, McDonnell is limited to selling F-18's only to the United States Navy for its own use, and then only if fully equipped for use from carriers and to selling to or for the use of foreign countries, either directly or through the United States Government, F-18 aircraft that are both carrier-suitable and conform to the configuration and structure of F-18 aircraft being purchased by the Navy for its own use, while Northrop is allocated the exclusive right to all other F-18 marketing opportunities, including the exclusive right to all Air Force sales, even in the exact Navy configuration.

Conclusion of Law 45, App. pp. 112a-113a.

Despite this naked allocation of customers, the Ninth Circuit reversed the District Court and held that a rule of reason rather than a *per se* test must be applied to the agreements because (a) "[w]e find no significant judicial rule-of-reason experience with either the particular practice or industry at issue here. . . ." 705 F.2d at 1051-1052, App. p. 37a; and (b) "[w]here the effect on competition is equivocal, it is appropriate to examine the purpose of the restraint in deciding whether to apply the *per se* rule," 705 F.2d at 1053, App. p. 39a.

Accordingly, the Ninth Circuit would remand the case for exactly the kind of "elaborate inquiry into the reasonableness" of the agreement which in the end "may provide little certainty or guidance about the legality of a practice in another context. . . .", and even though both juries and "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." *Arizona v. Maricopa County Medical Society*, 102 S. Ct. at 2472-73 (1982) (citations omitted); *United States v. Topco Associates, Inc.*, 405 U.S. at 609-10.

The Ninth Circuit's unsupported industry rationale simply cannot be squared with *Maricopa County Medical Society* where this Court stated:

We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the [particular] industry [T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved. . . ."

102 S.Ct at 2476. Equally contrary to *Maricopa County Medical Society* is the Ninth Circuit's view that the judiciary has had no antitrust experience with teaming agreements and that to condemn teaming agreement market divisions would create a *new per se* rule. No *new* rule is at issue.

Horizontal market division, like price fixing, has been held by this Court to be a practice "unlawful in and of [itself]," *Maricopa County*, 102 S. Ct. at 2473 n.15; *United States v. Topco Associates, Inc.*, *supra*. As the Fifth Circuit recently observed in *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 236 (5th Cir. 1983): "Such agreements have been classified as naked restraints of trade. A long line of cases stretching back to the nineteenth century has so condemned market division. [citations omitted]."⁴ There is no reason why agreements which allocate customers should be any less condemned simply because they may take the form of teaming arrangements or occur in the military aircraft industry. This is particularly true when the purpose of Northrop's desired market division is to limit competition so that Northrop can sell an F-18L at prices substantially higher than McDonnell's F/A-18A.⁵

Despite the Ninth Circuit's effort to distinguish the horizontal market division sought by Northrop from the "run-of-the-mill . . . market allocation between customers," 705 F.2d at 1051, it cannot conceal the fact that Northrop is seeking to prevent McDonnell from selling any F-18 to the U.S. Air Force and from selling certain versions of the F-18 even to the U.S. Navy and to it for, or with the Government's permission directly to, foreign customers.⁶ The anticompetitive effects are self-evident.

⁴ It makes no difference whether the agreement between McDonnell and Northrop is characterized as a division of *markets* or of *customers*. *United States v. Topco Associates, Inc.*, 405 U.S. at 612 (striking down "restrictions [that] amount to regulation of customers to whom members of Topco may sell Topco goods"); *United States v. Consolidated Laundries Corporation*, 291 F.2d 563, 574 (2d Cir. 1961) ("We fail to see any significant differences between an allocation of customers and an allocation of territory.")

⁵ As Northrop argued before the District Court:

"[T]he only way that the [F-18]L can ever compete . . . is for it to have some unique advantage that will allow it to compensate for the fact that it's going to cost more for awhile."

⁶ Northrop argues that the market division is a reasonable ancillary restraint to its alleged *retroactive* Basic Agreement "license" of "proprietary" data provided to McDonnell under the Teaming Agreement. Neither the

The Ninth Circuit's acceptance of Northrop's unfounded allegation that the Basic Agreement could be justified as procompetitive was rejected by this Court in *Maricopa County Medical Society*, where it held:

The respondents' principal argument was that the *per se* rule was inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some.

102 S. Ct. at 2477.⁷ See also *United States v. Topco Associates, Inc.*, 405 U.S. at 610 ("[T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.").

If the Supreme Court fails to accept certiorari in this case, and fails to summarily reverse the Ninth Circuit's decision and reinstate the District Court's Order, this Court's holdings in

District Court nor the Ninth Circuit gave much weight to Northrop's contention. The District Court found that the agreements were not "licenses" (498 F. Supp. at 1122, Findings of Fact 27 (App. p. 88a) and 35 (App. pp. 90a-91a) and Conclusions of Law 51 and 52 (App. pp. 114a-115a)), but even if they were, they could not justify the restrictions imposed by Northrop under its interpretation of the agreements. (Conclusions of Law 55 and 56, App. pp. 115a-116a.) The Ninth Circuit recognized that "Northrop's licensing theory alone is probably an insufficient reason to require rule-of-reason analysis . . ." 705 F.2d at 1054, App. p. 41a.

⁷ The Ninth Circuit also incorrectly relies on *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). There, as the Court in *Maricopa County* pointed out, the blanket license considered "did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price." 102 S. Ct. at 2479 (Citation omitted). In contrast, Northrop seeks to strictly limit McDonnell both as to the customers to which McDonnell may sell and the products (in terms of configuration) McDonnell may sell. See *Board of Regents v. NCAA*, 1983-1 CCH Trade Cas. ¶ 65,366 at 70,192 (10th Cir.) (restrictions imposed in *Broadcast Music* substantially less restrictive than television broadcasting restrictions imposed by NCAA because copyright holders could sell outside the blanket licensing arrangement imposed in *Broadcast Music*).

Maricopa County Medical Society and *Topco* will have been transgressed, and exhaustive, wasteful, and further ultimately pointless litigation will be required.

II. The Government Is An Indispensable Party To This Action In Which Northrop Seeks To Restrict The Government's Use Of Its "Unlimited Rights" In F-18 Data As The Government Determines To Be In The Interest Of National Defense And Foreign Policy

If it could be held that the District Court abused its discretion in determining that the Government is an indispensable party to this action involving its rights and vital national defense and foreign policy interests in the F-18, Rule 19 would be reduced to a nullity.*

As the District Court correctly found:

Procurement of the design, development and production of weapons systems for the defense of the nation is a governmental function peculiarly left to an amalgam of executive and legislative powers. In the exercise of those plenary powers the Government—subject only to self-imposed limitations—has the right to designate the who, what, when and where of weapons systems production. When that right can be called into question by a Court in what *cosmetically* is a dispute between private parties, the United States Government comes within the considerations of indispensability delineated by Rule 19, F.R.Civ. P. (Emphasis added.)

498 F.Supp. at 1117, App. pp. 60a-61a.

* The Ninth Circuit panel's decision violated the Ninth Circuit's own teachings in *Bakia v. County of Los Angeles*, 687 F.2d 299 (9th Cir. 1982) and *Walsh v. Centeo*, 692 F.2d 1239 (9th Cir. 1982). Completely disregarding the District Court's detailed findings of fact and conclusions of law, it impermissibly substituted its own discretion for that of the District Court. Indeed, the decision as initially filed made no mention of *Bakia* and *Walsh*. After the decision, petitioner pointed to this flaw, and the panel amended its opinion in a transparent attempt to correct the error which remains apparent on the face of the decision. (App. p. 52a.) Compare 700 F.2d at 518-19 with 705 F.2d at 1043.

The Ninth Circuit's opinion, in the absence of the Government, has circumscribed the admitted "unlimited rights" of the Government not only in YF-17 and F-18 data, but also in all "unlimited rights" data which the Government has acquired or may in the future acquire in any weapons system. This is precisely what Rule 19 was designed to prevent.

The Ninth Circuit states that, if McDonnell used "YF-17 derivative data" (i.e., F-18 data under Northrop's construction), and if such use "violated [McDonnell's] antecedent promises to Northrop", McDonnell would be liable to Northrop, notwithstanding McDonnell's reliance on the Government's unlimited rights in that data. 705 F.2d at 1045. Without consideration of the injunctive relief Northrop actually seeks, *this holding, qualifying McDonnell's use of the Government's unlimited rights data, is no less a restraint on the Government's rights to "use . . . or disclose . . . in any manner and for any purpose whatsoever . . . and to have or permit others to" use the data (DAR 9-201(d)) than an order directly against the Government prohibiting such disclosure to or use by McDonnell. The effect is the same.*⁹

The Ninth Circuit's opinion, brushing aside the Government's indispensability in finding neither of the alternative requisites of Rule 19(a) were present here, is grossly erroneous. The Ninth Circuit in dealing with the first factor of Rule 19(a) confused "complete relief," which cannot be accorded absent the Government, with "meaningful" relief. It simply *ignored* the District Court's specific finding that any judgment granting Northrop's requested relief cannot be complete or adequate because it would not bind the Government. (Conclusion of Law 15, App. pp. 103a-104a.)

In sweeping aside the second factor of Rule 19(a), the Ninth Circuit incredibly and impermissibly *assumed* from the

⁹ See also DAR 9-202(b)(1), Government shall acquire "unlimited rights in data resulting from performance of "experimental, developmental or research work"; and 9-202.2(e) which implicitly confirms a prime contractor's right to use subcontract "unlimited rights" data, as any other person to whom data is disclosed.

Government's absence—from a suit in which it could not be joined—that *the Government has no protectable interest*. First, Rule 19 does not require the indispensable party to assert a legally protected interest. The absence of a party is the reason for the existence of Rule 19. It is fundamental that:

The test, therefore, in the determination of whether an action is one against the United States, is *not determined by the named parties but is determined by the relief sought and the results of any judgment or decree which might be entered pursuant thereto*. (Emphasis added.)

Ogden River Water Users' Assn. v. Weber Basin Water Conservancy, 238 F.2d 936, 941 (10th Cir. 1956).

Second, it is plainly wrong to hold that the Government, which has spent billions of dollars to develop and acquire the design data and technology of the F-18 and to bring it into production, with McDonnell as prime contractor, for use as an implement of national defense and foreign policy (see pp. 1-2, 7-8, *supra*) has no claimed interest in the F-18.

Not only does the Government have an interest in the F-18 within the meaning of Rule 19(a)(2), but the relief requested by Northrop "may (i) as a practical matter impair or impede [the Government's] ability to protect that interest or (ii) leave [McDonnell] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [the Government's] claimed interest."

Despite Northrop's ambivalent representations concerning the injunctive and damage relief it seeks, the determination of *any* of Northrop's claims or the grant of *any* of Northrop's requested relief will inescapably impact the Government's rights in the F-18. While such relief would not be against the Government, *it would immediately* and severely constrain the scope and affect the exercise and value of the Government's rights, notwithstanding the fact that the Government has paid Northrop more than two billion dollars as YF-17 prime contractor and F-18 subcontractor to McDonnell. Declaratory and damage relief would have no less impact on the Government's rights and interests than the injunctions, in fact, requested

(See p. 3, *supra*). As Northrop argued to the District Court, "The Government . . . could not override a simple declaration of rights under the parties' contracts, or an award of damages [or] fair market value."

The Ninth Circuit's conclusion makes a mockery out of the Government's rights. If McDonnell were required to pay Northrop for use of the Government's "unlimited rights" data, McDonnell would be deterred from using the data. This would impact the Government's costs either (a) due to loss of the Government's paid-for McDonnell production efficiencies, which Northrop acknowledges in seeking to justify restraints to overcome its resulting price disadvantage,¹⁰ or (b) because McDonnell could afford to use the data only if the Government paid the costs incurred by McDonnell for its use.¹¹

Such results would inevitably prejudice the Government's rights and violate the policies stated in (a) DAR 9-201(d), which defines the Government's "unlimited rights" in data, (b) DAR 9-301.2 which, reflecting such rights, states that the Government should not pay for the use of data in which the Government has acquired "unlimited rights," and (c) DAR 4-117 which precludes teaming arrangements that "limit the Government's

¹⁰ The Government also would be exposed to multiple tooling, facilities, and similar costs. Further, to the extent of lost sales to foreign customers due to such a price disadvantage, the Government would lose not only the benefit to it of higher production rate efficiencies, but also the research and development recoupment charges which such foreign customers would pay (DAR 1-2403 and 6-1306).

¹¹ Such costs would be allowable costs under DAR Section XV, and the Government would be required, depending on the contract type, either to reimburse McDonnell for the costs or, at least prospectively, to include the costs in its contract price. In any event, if the Government elected to require McDonnell's production of an F-18 contrary to Northrop's claims, it would be obligated to indemnify McDonnell. 50 U.S.C. App. § 2071; 15 C.F.R. Part 350, § 24. The Government could also face liability to Northrop under 10 U.S.C. § 2273 and under 22 U.S.C. § 2356, as the District Court and Ninth Circuit respectively concluded. 498 F.Supp at 1118-1119; 705 F.2d at 1040.

rights" to "provide the selected prime contractor with data rights owned or controlled by the Government."¹²

Furthermore, if a judgment was rendered as requested by Northrop, McDonnell would be subjected to the risk of incurring double or otherwise inconsistent obligations by reason of the Government's "unlimited rights" in the F-18. Under the "Changes" clauses mandated by DAR¹³ in existing and future contracts, the Government has the right to direct changes in the configuration of F-18's being produced by McDonnell. Thus, McDonnell would be subject to an order precluding it from making changes inevitable in the evolution of an air weapons system over its useful life,¹⁴ and obligated to the Government to make such changes.

Having avoided an analysis of Rule 19(b) by finding that the tests of 19(a) were not met, the Ninth Circuit did not discuss the tests of Rule 19(b). The District Court analyzed these tests, found that the factors of Rule 19(b) were met, and

¹² Unquestionably, the Government's rights and interests are more directly and seriously threatened in this case than they were in *Franz v. East Columbia Basin Irrigation District*, 383 F.2d 391 (9th Cir. 1967) (United States indispensable to a suit by a private owner of land in Irrigation District complaining he was not allowed to withdraw land from District, the court stating "if [plaintiff is] allowed to withdraw [his land] from the Irrigation District, the financial solvency of the project will be threatened and the chances of repayment to the United States of money invested in the project will be damaged"); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir. 1975) (Government indispensable to a private couple's suit to quiet title in their land against claims by an Indian tribe); or *Blake Construction Co. v. American Vocational Ass'n*, 419 F.2d 308 (D.C. Cir. 1969) (Government indispensable to a suit by a construction company seeking to impress a trust on funds received by another contractor from the GSA).

¹³ See, e.g., 7-103, 7-103.2, 7-203 and 7-203.2.

¹⁴ E.g., the F-4 Phantom originated as a Navy fleet defense fighter, but became a tactical fighter/bomber, with mission oriented changes. Here, for example, for cost or weight-saving mission purposes, the Government could well direct McDonnell to delete from some U.S. Navy F-18's any number of features, such as the bolt-on/bolt-off launch bar used for carrier take-offs, not required for U.S. Marine Corps shore-based uses.

correctly determined that the Government was an indispensable party. (See Conclusions of Law 9-26, App. pp. 101a-108a.)

To correct the misapplication of Rule 19 and the prejudice to the Government's rights created by the Ninth Circuit's opinion, this Court should review it and reinstate the District Court's decision.

III. The Ninth Circuit's Decision That The Political Question And Act-Of-State Doctrines Are Not Applicable To This Dispute Over Who Can Produce And Sell F-18's Conflicts With This Court's Decision In *Gilligan v. Morgan*, 413 U.S. 1 (1973), And The Second Circuit's Decision In *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (1977).

Judicial determination of Northrop's contract, tort, attempt to monopolize and unfair competition claims over who can produce and sell which configurations of the F-18, to which military services of the Government and to which of its allies, and whether McDonnell attempted to monopolize will necessarily entangle the Judicial Branch in national defense and foreign policy matters, including the motivations for military procurement decisions of the Government and of foreign states, matters committed to the Legislative and Executive Branches of the United States Government under Art. I § 8, Cls. 12, 13, 14 and 16 and Art. II, § 2, of the Constitution.

The Political Question

As this Court in *Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973) stated:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. . . . It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system;

the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.

The all pervasive direct and ultimate control by the Government as the sole domestic buyer and the sole arbiter of foreign sales and seller of all Foreign Military Sales ("FMS sales")¹⁵ distinguishes this dispute, only "cosmetically . . . a dispute between private parties" as found by the District Court (498 F.Supp at 1117), from the mere "private commercial activity which the judiciary is uniquely equipped to resolve" seen by the Ninth Circuit (705 F.2d at 1047).

Contrary to the Ninth Circuit's statement, the District Court identified *all* of the factors in *Baker v. Carr*, 369 U.S. 186 (1962) as applicable to Northrop's claims and McDonnell's defenses. With no recognition or discussion of the voluminous uncontroverted record of Government control and decisions affecting Northrop's sales efforts, the Ninth Circuit simplistically concluded that it discerned "no support for characterizing Northrop's claims as political questions. . . ." 705 F.2d at 1047, App. p. 27a. The Ninth Circuit's error proceeded from its failure to recognize the scope and significance of the Government's "unlimited rights" and the record of the extent to which the Government has and in the future may exercise these rights through military procurement decisions.

In attempting to distinguish *Gilligan*, the Ninth Circuit focused solely on alleged activity by McDonnell as private commercial conduct "neither authorized nor directed by . . . the Government." 705 F.2d at 1047. It failed, however, to comprehend that, *as pleaded* by Northrop (see note 18, *infra*), it could not have been McDonnell's alleged misconduct which may have caused Northrop's alleged injury. Any injury was caused by the decisions of our Government, including the Congressional NACF technology directive, the DOD and Navy's teaming request, the Air Force's selection of the F-16 over the F-17, the Navy's selection of the F-18 and of McDonnell as its

¹⁵ See, e.g., Conclusions of Law 1, 9, 34-37, 63, App. pp. 99a, 101a, 110a-111a, 117a.

prime contractor, the Government's decision not to procure either the F-17 or an F-18L for its use, the Government's determination of the allies to which F-18L's could and could not be offered or sold—together with the decisions of allies not to procure an F-18L.

These and other military procurement decisions of the Legislative and Executive Branches must of necessity be examined by the judiciary if Northrop is to establish the fact and amount of injury *and* if McDonnell is to defend itself against Northrop's claims.

By concluding that Northrop's "claims" are not "political questions," thus failing to recognize that it is the *ultimate issues to be resolved* that are "political questions," the Ninth Circuit has entered the thicket of *Baker v. Carr* and impermissibly catapulted the judiciary into the arming and equipping of our armed forces and those of our allies, in conflict with the dictates of *Gilligan v. Morgan*, 413 U.S. 1, at 10-13 (1973), that such matters are non-justiciable political questions.

Act-of-State Doctrine

Given the uncontroverted record before it, the Ninth Circuit's ruling that the act-of-state doctrine is not applicable to this suit cannot be reconciled with the Second Circuit's ruling in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (1977), which held that even though a party does not challenge the foreign act itself, if inquiry into the motivations or reasons for the act is necessary, then the suit is barred. Significantly, the Ninth Circuit opinion fails to even mention *Hunt*.

Like plaintiff in *Hunt*, Northrop contended below that it does not challenge the foreign state's procurement decisions, but only that such decisions were, and will be, induced by alleged conduct of McDonnell. The Ninth Circuit's view that it will not be necessary to inquire into foreign decisions to determine the causal effect of the alleged activity was pointedly rejected by *Hunt*:

It is well established that a private plaintiff who seeks damages in an antitrust action must allege and establish that his business or property was injured as a direct result of the Sherman Act violation. 550 F.2d at 76.¹⁶

Faced with allegations strikingly similar to Northrop's here, the court in *General Aircraft Corp. v. Air America, Inc.*, 482 F. Supp. 3, 6-7 (D.D.C. 1979), following *Hunt*, held:

[W]here the injury complained of results directly from the acts or decisions of a foreign sovereign and only indirectly from defendants' allegedly unlawful anti-competitive activities, the Court must dismiss the claims. . . . The motivation underlying purchasing decisions made by foreign governments is an essential issue raised by the pleadings. . . .

See also *Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977), which also followed *Hunt*.

Northrop admits, and the District Court and Ninth Circuit found, that military procurement decisions of foreign sovereigns are acts of state. The Ninth Circuit, but not the District Court, chose to ignore that, as pleaded, Northrop must demonstrate that its business was damaged as a result of these decisions of foreign states not to purchase an F-18L and that it was the alleged misconduct of McDonnell which directly or indirectly wrongfully caused these decisions. *Radiant Burners, Inc. v. Peoples Gas Light and Coke Company*, 364 U.S. 656, 660 (1961); *Salerno v. American League of American Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970). McDonnell, in defense, has the right to demonstrate that its conduct,

¹⁶ *Hunt* also rejected the Ninth Circuit's approach here, that since Northrop seemingly has stated a claim, whether or not it can ultimately prove a causal connection, dismissal prior to trial is inappropriate. *Hunt* noted that there could be no antitrust liability attributed to defendants unless plaintiff could prove that, but for the challenged activity, Libya would not have moved against it, and, thus, the act-of-state doctrine was inescapably raised by the pleadings and would be considered on a motion to dismiss. 550 F.2d at 76.

whether or not wrongful, did not influence and cause these decisions.¹⁷

The Ninth Circuit further chose to ignore that, in requiring a rule-of-reason analysis under Section 1 of the Sherman Act and in disregarding the Government's control of the market, the judiciary will be required to examine the military aircraft industry of the free world, and in that context to define the relevant product and geographic markets and measure the reasonableness of Northrop's alleged restraints and McDonnell's power to monopolize. Such an examination in turn will require analysis of the air weapons acquisition process of the United States and its allies, their defense requirements (including present inventory mix, mission requirements, and projected inventory requirements), internal political forces, foreign policies, industrial base, technical and financial capabilities, and their coproduction and offset requirements and demands. It will also require examination of the negotiations and deliberations of the United States with those foreign allies respecting these highly sensitive matters relating to the sale of the F-18 as an instrument of U.S. foreign policy.

Examination of these issues raises insurmountable problems of discovery and proof, including securing this highly sensitive evidence and testimony.

If the Ninth Circuit's decision is permitted to stand in conflict with *Hunt v. Mobil Oil Corp.*, *supra*, judicial examination into these motivations and acts and policies of our allies in eliminating F-18L's from their consideration must necessarily commence upon remand.

¹⁷ The Ninth Circuit dealt too simplistically with its own decision in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976). It based its opinion on superficial distinctions, such as whether Northrop sought relief against any sovereign state (705 F.2d at 1049) instead of whether, as here, a decision in the case will have "the potential for interference with our foreign relations" (549 F.2d at 607), in which circumstance the judiciary must abstain from further inquiry.

IV. A Prime Contractor Cannot Unlawfully Attempt To Monopolize A Military Air Weapons System Market In Which The Production, Sale, Purchase And Use Of The Product Is Controlled By The U.S. Government.

Northrop sought below to elevate contract, tort and unfair competition allegations against McDonnell to the level of an attempted monopolization claim sufficient to withstand a summary judgment motion.¹⁸ Accepting, *arguendo*, that the acts alleged to be predatory actually occurred, given the Government's pervasive control, no market encompassing the F/A-18A and its variants¹⁹ could be "monopolized" as that term has been defined by this Court.

The District Court correctly addressed this issue when it stated:

The United States Government has the absolute and overriding control of both the production and sales potential of the product that brings these parties into vitriolic conflict. . . . The United States Government *is the market* concerned with production and distribution of weapons systems for governmental military establishments. . . . The United States Government also makes the world market. No single group of producers has any power to expand a market share beyond that considered by the United States Government in the implementation of domestic defense and foreign policy which is in the best interest of its citizens.

498 F. Supp. at 1123, App. pp. 72a-73a.²⁰

¹⁸ In its attempt to cast McDonnell in the role of a predator, Northrop in its Brief before the Ninth Circuit raised additional allegations of conduct (e.g., boycott, withholding of data) which neither appear in its Amended Complaint nor arise from it by fair implication.

¹⁹ Northrop has alleged that the "F/A-18A and F-18L constitute a relevant submarket for the purposes of Section 2 of the Sherman Act. . . ." Amended Complaint ¶ 81, App. p. 166a. McDonnell has accepted this market definition for purposes of disposition of its motions to dismiss and for summary judgment only.

²⁰ See also Findings of Fact 50-58, App. pp. 96a-99a; Conclusions of Law 63-67, App. pp. 117a-119a.

The effect of this Governmental control in the market for advanced weapons systems is widely acknowledged: "In order to understand the economic operations of the U.S. defense industry, it is first absolutely essential to recognize that there is no free market at work in this area and that there likely cannot be one because of the dominant role played by the federal government." J. Gansler, *The Defense Industry* 69 (1980).²¹ As noted in the recent book describing the ACF competition and the selection of the F-16 over Northrop's proposed F-17 by the U.S. Air Force and the European Consortium nations: "No free markets exist in this milieu, there is usually only one customer, price competition is often irrelevant, the government bureaucracy is stifling." I. Dörfer, *Arms Deal, The Selling of the F-16* xv (1983). As put in *Arms Transfers in the Modern World* 207 (S. Newman & R. Har-kavy, eds. 1979): "Fighter planes are not made in heaven, but in Congress."

Because of the overarching control exercised by the Government, no seller of an advanced air weapons system can attain monopoly power,²² a necessary element of the offense of

²¹ For similar views, See M. Peck & F. Scherer, *The Weapons Acquisition Process: An Economic Analysis* 57-60 (1962); J.R. Fox, *Arming America: How the U.S. Buys Weapons* 37-39, 385 (1974).

²² "Monopoly power" has been defined by this Court as "the power to raise prices or exclude competition" in the relevant market. *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956). The term is frequently used interchangeably with "market power," which is defined as "the ability to raise price by restricting output." II P. Areeda & D. Turner, *Antitrust Law* ¶ 501 (1978).

McDonnell does not possess the actual or threatened ability to raise prices for the F-18 by limiting the quantity produced. Northrop and the Ninth Circuit recognized that, McDonnell could not exclude competition by preventing the Government from purchasing the F-18 (for itself or for foreign purchasers) from any source the Government designated. 705 F.2d at 1045. Northrop's claims of threatened unlawful exclusion from the market by McDonnell are particularly incredible in light of the fact that Northrop is performing more than a 40% workshare in F-18's built by McDonnell as prime contractor.

monopolization.²³ And in a market where the completed offense of monopolization could not occur, it is axiomatic that unlawful attempted monopolization cannot be established either.²⁴

Under this Court's prior holdings, proof of three factors is necessary to establish attempted monopolization: (1) a specific intent to monopolize; (2) predatory or anticompetitive conduct or acts engaged in to further that intent; and (3) a dangerous probability that the defendant would, if its acts were successful, achieve monopoly power.²⁵ Logically, establishing this final "dangerous probability" element requires a showing that the defendant presently possesses, in a relevant market, a power proximate to monopoly power—a showing which has not and cannot be made here.

The dangerous probability requirement first articulated in *Swift*, has been followed consistently by this Court and by all circuits,²⁶ save one—the Ninth. Application of the requirement has been exceptionally controversial within that circuit. 705 F.2d at 1058. Although some Ninth Circuit decisions have employed the classic formulation,²⁷ others have drastically departed from its standards. In a widely-criticized line of cases commencing with *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964), some Ninth Circuit decisions have completely dispensed with the danger-

²³ *E.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966).

²⁴ McDonnell does not argue that the defense industry is immune from antitrust scrutiny. It simply asserts that the elements of a Section 2 violation have not and cannot be established in this particular instance.

²⁵ *Swift & Co. v. United States*, 196 U.S. 375 (1905). *See also*, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

²⁶ *See Handler & Steuer, Attempts to Monopolize and No Fault Monopolization*, 129 U.Pa.L.Rev. 125, 128-29 (1980).

²⁷ *See, e.g.*, *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Wisdom Rubber Indus., Inc. v. Johns-Manville Sales Corp.*, 415 F. Supp. 363 (D. Hawaii 1976).

ous probability requirement.²⁸ A third line of authority within the circuit, while purporting to impose the traditional standard, permits a dangerous probability to be inferred from specific intent, which in turn can be inferred from conduct.²⁹

The Ninth Circuit below attempted to sidestep this conceptual morass by finding that "there was sufficient evidence of McDonnell's probability of success to avoid summary judgment." 705 F.2d at 1058. But since it failed to explain how McDonnell could possess the power to monopolize the Government-controlled market, its holding that Northrop has established a *prima facie* attempted monopolization claim can only be supported by either dispensing with the dangerous probability requirement completely or by inferring its existence. The flaw in such an approach in this instance is evident. The Ninth Circuit's decision is thus in conflict with the teachings of this Court and with sound antitrust policy.³⁰

²⁸ *E.g.*, *Greyhound Computer Corp. v. IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Knutson v. The Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

²⁹ *E.g.*, *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 103 S.Ct. 364 (1982); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). When so inferred, "dangerous probability in effect is conclusively presumed—in other words, dispensed with." Handler & Steuer, *Attempts to Monopolize and No Fault Monopolization*, 129 U. Pa. L. Rev. 125, 157-58 (1980).

³⁰ As Don T. Hibner, Jr., co-counsel below for Northrop, warned in a 1967 article:

When a court [in an attempted monopolization case] either allows a very narrow market definition, or dispenses with market analysis altogether, the advantages to a treble damage plaintiff are almost without dimension:

... (e) Any business tort, whether unfair competition or trade libel, can be pleaded as an attempt to monopolize case, and treble damages sought.

Hibner, *Attempts to Monopolize: A Concept In Search of Analysis*, 34 Antitrust L.J. 165, 168-69 (1967). This approach "should be disturbing not only to defense oriented antitrust lawyers, but to antitrust scholars as well." *Id.* at 171.

Moreover, the decision is particularly distressing in that it would unnecessarily require a trial of meritless claims. In the words of one recent commentary:

Almost without exception, when courts have ruled in favor of plaintiffs in the Ninth Circuit, it has been only to deny or reverse a summary determination and to require further proceedings. It is the ten other circuits that have expedited litigation, by refusing to entertain attempted monopolization claims when it is clear that no dangerous probability exists. *Handler & Steuer, supra* note 26 at 163.

This case, then, presents the Court with the opportunity to correct a serious and potentially costly error and to provide much-needed guidance to the lower courts and the business community on the law of attempted monopolization and the dangerous probability requirement, which the Court has not substantively analyzed in over thirty years.³¹ The public interest would be well-served by the Court's consideration of this important issue in the context of a dispute affecting the availability of an advanced air weapons system vital to our national defense and foreign policy.

³¹ "What is needed today is clarification, to assure that [the dangerous probability] requirement is preserved and to correct the disarray caused by the Ninth Circuit rulings. . . . [T]he resulting uncertainty should be allayed as soon as possible." *Handler, Reforming the Antitrust Laws*, 82 Col. L. Rev. 1287, 1353 (1982).

V. Conclusion

For the reasons stated herein, this Court should grant the Petition for Certiorari, reverse the opinion of the Ninth Circuit and reinstate the District Court's decision.

Respectfully submitted,

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July 18, 1983

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No. ____

Office - Supreme Court, U.S.

FILED

JUL 18 1983

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

McDONNELL DOUGLAS CORPORATION

Petitioner,

v.

NORTHROP CORPORATION

Respondent.

**APPENDIX TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT**

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APPENDIX
ORDER OF NINTH CIRCUIT DENYING PETITION FOR
REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5165
81-5172

NORTHROP CORPORATION,
Plaintiff/Appellant/Cross-Appellee,
v.

MCDONNELL DOUGLAS CORPORATION,
Defendant/Appellee/Cross-Appellant.

ORDER

Before: POOLE and BOOCHEVER, Circuit Judges, and
SOLOMON,* Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

NOTICE OF ENTRY OF JUDGMENT BY NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5165 and 81-5172

NORTHROP CORPORATION,
Plaintiff/Appellant/Cross-Appellee,
v.

MCDONNELL DOUGLAS CORPORATION,
Defendant/Appellee/Cross-Appellant.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file-stamp date
[February 28, 1983] on the attached decision of the Court.

OPINION OF NINTH CIRCUIT AS AMENDED

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Nos. 81-5165, 81-5172

NORTHROP CORPORATION,
Plaintiff/Appellant/Cross-Appellee,
v.

MCDONNELL DOUGLAS CORPORATION,
Defendant/Appellee/Cross-Appellant.

Argued and Submitted March 1, 1982.

Decided Feb. 28, 1983.

As Amended May 9, 1983.

George L. Hecker, Cave, McPheeters & McRoberts, Los Angeles, Cal., for McDonnell Douglas Corp.

John W. Chierichella, Eldon H. Crowell, Crowell & Moring, Washington, D.C., for Northrop Corp.

Appeal from the United States District Court for the Central District of California.

Before POOLE and BOOCHEVER, Circuit Judges, and SOLOMON,* Senior District Judge.

BOOCHEVER, Circuit Judge:

This appeal and cross-appeal present complex issues concerning the extent to which private parties may obtain redress for alleged injuries occurring in the heavily regulated military aircraft industry. The principal issues are whether: (1) suit against the Government pursuant to 22 U.S.C. § 2356 (disclosure of proprietary data) is the exclusive remedy; (2) the Government is a necessary party; (3) the claims present non-

* Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

justiciable political or foreign policy questions; (4) certain agreements between the parties are *per se* illegal restraints of trade; and (5) the Government so pervades the relevant market that no trade or commerce exists for Sherman Act purposes.

The case arises out of a series of "teaming" agreements that Northrop and McDonnell Douglas ("McDonnell") entered into at the Government's request to develop military aircraft. The agreements allegedly limited Northrop to marketing those aircraft developed through the teaming effort that were suitable for land-based operation and McDonnell to marketing those suitable for aircraft-carrier operation. Despite its extensive involvement in the military aircraft industry, the Government is not a formal party to either the agreements or this action.

The trouble giving rise to Northrop's complaint and McDonnell's counterclaim began when McDonnell was awarded a large Navy contract, Northrop lost the competition for a similar Air Force contract, and McDonnell subsequently began marketing land-based aircraft to foreign countries. Northrop contends that McDonnell's marketing of land-based aircraft violated the agreements. It filed suit claiming, *inter alia*, fraud, breach of contract, economic coercion, refusal to deal, unfair competition, and industrial espionage. McDonnell subsequently filed a counterclaim seeking, *inter alia*, a declaration of rights under the agreements and damages for Northrop's allegedly illegal conduct and breaches of the agreements.

After some preliminary procedural maneuvering, the district court dismissed Northrop's first amended complaint in its entirety and, alternatively, granted McDonnell summary judgment as to five of the eight counts in the complaint. *Northrop Corp. v. McDonnell Douglas Corp.*, 498 F.Supp. 1112 (C.D. Cal. 1980). The district court also dismissed McDonnell's counterclaim and, alternatively, granted Northrop summary judgment on the ground that the counterclaim was the "mirror image" of Northrop's complaint.

We conclude that dismissal and summary judgment were inappropriate as to Northrop's complaint and McDonnell's counterclaim. Accordingly, except for the denial of a motion to modify a finding of fact, which we affirm, the decision of the district court is reversed and the matter remanded for further proceedings.

I

BACKGROUND

A. Facts

Between 1965 and 1972 Northrop devoted substantial resources toward developing a lightweight, moderately priced, multi-mission jet fighter. This development effort produced an aircraft design Northrop termed the P-530.

In 1972, the United States Air Force awarded Northrop a multi-million dollar contract to produce two prototype aircraft (designated the "YF-17") based generally on the P-530 design. The Air Force concurrently awarded a similar contract to General Dynamics Corporation to produce two prototypes based on an alternative design concept (designated the "YF-16"). Both contracts were awarded as part of the Air Force's Air Combat Fighter ("ACF") competition for prototype development of lightweight land-based fighters. In keeping with its usual procurement policy (*see generally* Armed Services Procurement Regulations ["ASPR"], 32 C.F.R. §§ 7-104.-9, 9-201(d), and 9-202.2(b) (1981)), the Government obtained unlimited rights through the contracts in the technology incorporated in the YF-16 and YF-17 prototypes.

McDonnell did not compete for an ACF contract. Instead, McDonnell concentrated on improving its F-15 design, which was for a more specialized and expensive land-based fighter than the YF-16 and YF-17 designs.

In 1974, the United States Navy announced the Navy Air Combat Fighter ("NACF") competition to develop a lightweight fighter suitable for aircraft carriers. To cut costs, Con-

gress directed the Navy to make maximum use of the technology already developed and paid for in the Air Force's ACF program. The Navy was thereby forced to limit its NACF competition to proposals based on General Dynamic's YF-16 and Northrop's YF-17 technology. Because of the headstart possessed by General Dynamics and Northrop in this technology and the limited funds the Navy had available to compensate other companies for the expense of catching up, the NACF competition was effectively limited to General Dynamics and Northrop.

Although General Dynamics and Northrop were essentially the only NACF competitors, neither possessed significant experience in producing carrier-suitable aircraft. To overcome this shortcoming, the Defense Department and Navy urged them to "team"¹ with companies having greater Navy experience. McDonnell was one of three or four companies that possessed the requisite Navy experience. Although, as noted by the district court, the parties dispute who was the pursuer and who the pursued,² the outcome of the corporate courtship

¹ In teaming arrangements, often used in large military projects, two or more private contractors pool their financial and technological resources to work on a project they would be unable to handle alone. See *Experimental Engineering v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980).

² See 498 F. Supp. at 1115. The record supports the district court's view that Northrop and McDonnell "desperately needed each other if they—jointly and severally—were to succeed in tapping the great potential of the opportunity presented by the Navy's need for a new aircraft. . . ." *Id.* For instance, a McDonnell executive noted in an internal memorandum that a teaming agreement:

was the only crap game in town, so we had to play it. . . . The Navy wasn't going to let us propose our own airplane and win with it, so we had to go this way.

Similarly, although both parties make extravagant claims about their respective contributions to the eventual teaming effort, it seems clear that neither party would have gotten far without the other.

is clear. On October 2, 1974, Northrop and McDonnell executed a "Teaming Agreement" to develop and propose variants of the YF-17 to the Air Force and Navy.

The Teaming Agreement was the first of three major written agreements between the parties. The parties agreed that Northrop would concentrate on the Air Force's ACF competition while McDonnell concentrated on the Navy's NACF competition. The proposal submitted to the Air Force listed Northrop as prime contractor and McDonnell as associate contractor; the roles were reversed in the proposal submitted to the Navy. The Agreement was intended "to be the basis for later agreements to be definitized."

On January 14, 1975, Northrop's YF-17 lost the ACF competition to General Dynamics' YF-16. On May 2, 1975, the Navy announced that McDonnell's proposed fighter had won the NACF competition, designating the winning design the "F-18". Approximately two months later, the parties entered into a "Basic Agreement" drawn along the same lines as the prior Teaming Agreement.³ The Basic Agreement has five key provisions:

1. In the "Definition" clause, the F-18 is defined as "a carrier-based derivative of [Northrop's] YF-17 aircraft. . . ."
2. In the "Objective" clause, the parties expressed their commitment to:

work together (without in any manner intending to create a joint venture or otherwise incur or imply joint or several liability) for the purpose of obtaining and performing contracts for the development and production of derivatives of [Northrop's] YF-17 aircraft that are responsive to the requirements of the U.S. Navy and foreign customers.

³ Both the Teaming and Basic Agreements were drafted in apparent accordance with ASPR 32 C.F.R. § 4-117 (1981) (authorizing "contractor team arrangements"). The Government was not a party to either agreement.

3. In the "Contract Responsibilities" clause that is at the heart of this dispute, the parties agreed:

3. (a) . . . that [McDonnell] will be prime contractor in connection with contracts with the U.S. Navy for the development of the F-18 and for the production of those F-18 aircraft purchased by the U.S. Navy for its own use. Furthermore, in the event a foreign customer desires to procure from [McDonnell] . . . F-18 aircraft *of basically the same configuration* . . . [McDonnell] will be prime contractor. . . .

(b) [Northrop] may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the [Northrop] YF-17 other than those referred to in paragraph (a) above.

(emphasis added). The parties dispute whether the underscored phrase "of basically the same configuration" limits McDonnell to providing only carrier-suitable derivatives of the F-18.

4. The "Data Exchange" clause mutually obligates the parties to exchange available information on the F-18 and YF-17 technology. Pursuant to this clause, the exchanged technology "may be used by the receiving party only in furtherance of the contracts referred to in paragraph 3. . . ."⁴

5. The "Division of Effort" clause provides that, absent a contrary Navy directive, all F-18 production was to be performed according to the distribution of labor specified by the parties in the agreement (*see* the "Workshare" discussion, *infra*, at § III).

The Government subsequently awarded McDonnell a prime contract for over \$1.06 billion to make the F-18 operational. McDonnell, in turn, awarded Northrop the principal sub-contract for the project. Under the prime contract, the Government paid McDonnell for interim design activities not covered by prior contracts. This payment was "flowed down"

⁴The parties sharply dispute whether this clause reflects a "license" of technology, or is merely a new teaming arrangement consistent with ASPR 32 C.F.R. § 4-117 (1981).

to the subcontract, reimbursing Northrop for its previously unfunded interim design work. Both the prime contract and subcontract granted the Government unlimited rights in F-18 technology and incorporated by reference an addendum (No. 438 to MIL-D-8706) that authorized the use and submission of any YF-17 technology found applicable to F-18.

In late 1975 and early 1976, Iran commenced negotiations with Northrop to become the first customer of a YF-17 derivative land-based fighter. Northrop's land-based derivative was designated the F-18L; McDonnell's Navy design had become known by this time as the F-18A. Concerned that Northrop's sales of F-18L fighters to Iran might undermine its F-18A program, the Navy persuaded the parties to enter a new agreement on August 26, 1976.

The August 26, 1976 Agreement essentially reaffirms the Basic Agreement, but contains a more explicit provision regarding the type of fighter Northrop could develop and market. The August 26th Agreement provided that Northrop "has elected to design, develop and produce for sale to the United States and to foreign governments all aircraft designed only for land-based operations which are derived from the YF-17."⁵ Northrop's agreement to limit its F-18L production to land-based aircraft assured the Navy that Northrop's efforts would not interfere with McDonnell's completion of the carrier-suitable F-18A. The August Agreement also satisfied the Navy's demand that the parties agree upon a Foreign Military Sales Master Plan pursuant to Defense Department Directive 5105.38M.

B. Procedural Posture

Northrop initiated the present action on October 26, 1979. In its first amended complaint, Northrop alleged that McDonnell has waged a deliberate campaign to monopolize the market for

⁵ The August 26th Agreement expressly provided that McDonnell's rights under the Basic Agreement were left unchanged.

YF-17 derivative aircraft by crippling Northrop as a viable competitor. Although Northrop attacked on a broad front, its numerous allegations generally related to one of four main theories of wrongful conduct on the part of McDonnell.⁶ First, McDonnell allegedly delayed production of all F-18 derivatives, including Northrop's F-18L, in order to promote sales of its own land-based F-15 in the interim. Second, McDonnell allegedly attempted to restrict Northrop's F-18L to a specialized class of limited-use fighters known as "day fighters" so that McDonnell's F-15 and F-18A fighters would be more attractive to customers desiring multi-mission aircraft. Third, McDonnell allegedly breached its obligations under the Basic Agreement to exchange F-18 technology and to subcontract

⁶ The relief sought by Northrop in the first amended complaint may be summarized as follows:

Count One—injunctive relief to prevent McDonnell from misappropriating Northrop's property by breaching the Agreements.

Count Two—injunctive relief to prevent McDonnell from misappropriating Northrop's property by exceeding the "license" of technology granted under the Agreements.

Count Three—a declaration of the parties' rights under the Agreements.

Count Four—damages for fraud by McDonnell in the inducement to enter the Agreements.

Count Five—an accounting for profits earned by McDonnell as a result of its breaches of the Agreements.

Count Six—injunctive relief and damages for McDonnell's alleged attempt to monopolize the domestic and foreign markets for F-18's in violation of section 2 of the Sherman Act.

Count Seven—injunctive relief and damages for McDonnell's acts of unfair competition.

Count Eight—recovery in *quantum meruit* for contributions to the joint business relationship for which Northrop has not been compensated.

the specified share of work to Northrop on F-18A aircraft sold in foreign countries. Finally, McDonnell allegedly breached paragraph 3 of the Basic Agreement by representing to foreign customers, particularly Israel, that McDonnell could serve as prime contractor on any version of the F-18, including a land-based version. McDonnell subsequently filed its counterclaim.

II

DISMISSAL OF NORTHROP'S CLAIMS

The district court dismissed Northrop's complaint for (A) lack of subject matter jurisdiction; (B) failure to join an indispensable party—the United States; and (C) failure to state a claim because of non-justiciable political and foreign policy questions. Northrop challenges each of these determinations on direct appeal (No. 81-5165).^{6a}

^{6a} We discern no merit in McDonnell's contention that Northrop has abandoned the claims in counts 4-8 of its complaint by not explicitly challenging the district court's rulings that Northrop could not show injury in fact and failed to allege an unlawful combination. The two findings are found in the order drafted for the court by McDonnell, but are not mentioned in the court's findings or opinion. Our review of the findings and opinion demonstrate that, notwithstanding the inconsistent language in its order, the court considered itself precluded from examining the injury issue by the political question and act of state doctrines. The application of those doctrines has been challenged on appeal. Northrop's discussion in its Opening Brief of the evidence of an unlawful combination suffices to preserve the claim.

The conduct and relief at issue in counts 4-8 overlap and are inextricably intertwined with that in counts 1-3. We decline to seize upon the variance between the district court's order and its findings and opinion to effect an abandonment of claims, particularly given that the evidence relevant to the allegedly abandoned claims is so similar to that underlying the other claims that must be tried on remand in any event.

A. Subject Matter Jurisdiction: Exclusivity of 22 U.S.C. § 2356

The district court held that the "Government's clear agency in [Foreign Military] sales [FMS] and its, at least putative, agency relationship in the licensing of commercial sales permissible only in the best interest of United States foreign policy can only be clarified in an action brought pursuant to 22 U.S.C. § 2356."⁷ 498 F.Supp. at 1119. It then dismissed the entire complaint for lack of jurisdiction,⁸ because § 2356 makes suit against the United States the exclusive remedy. Northrop argues that its claims do not involve McDonnell's disclosures but rather, *inter alia*, fraud, breach of contract, and attempt to monopolize, none of which are within the statute. McDonnell characterizes misuse and misappropriation as the *sine qua non* of all of Northrop's claims, states that those are within the statute, and argues that it was the Government's agent in using the information.

Section 2356, on its face, does not encompass Northrop's claims for fraud, breach of contract, attempt to monopolize, or anything else not pertaining to disclosure of proprietary in-

⁷ 22 U.S.C. § 2356 (1976) waives sovereign immunity for claims within its scope, and provides that:

(a) Whenever, in connection with the furnishing of assistance under this chapter—

(1) * * *

(2) information, which is (A) protected by law, . . . is disclosed by the United States Government or any of its officers, employees, or agents in violation of such restrictions, the exclusive remedy of the owner . . . is to sue the United States Government for reasonable and entire compensation for such practice or disclosure in . . . district court . . . or in the Court of Claims. . . .

⁸ The court denied McDonnell's motion to dismiss with respect to 10 U.S.C. § 2273 (1976) and 28 U.S.C. §§ 1346(a)(2) and 1491 (1980). 498 F.Supp. at 1119-20. McDonnell has not cross-appealed that denial.

formation.⁹ Moreover, even if, *arguendo*, misuse and misappropriation were the *sine qua non* of such claims, McDonnell's alleged misuse and misappropriations are not covered by the statute because, as discussed below, it is not an agent of the Government.¹⁰

Because at least some of Northrop's claims can arguably be construed as challenging McDonnell's disclosure of proprietary data, it is appropriate to consider whether McDonnell is the Government's "agent" within the meaning of § 2356 in disclosing information to potential foreign buyers. In addressing this question it is important to note that there are principally two types of foreign sales—FMS sales and commercial sales. Commercial sales are distinguishable from FMS sales in that:

[C]ommercial sales are made directly between a private contractor and a foreign country; the sale does not go through the government-to-government channels which foreign military sales go through. Consequently, the FMS rules do not apply to commercial sales. Although not a party to the sale, the government plays a substantial role inasmuch as a contractor must obtain an export license before it can conclude a commercial sale.

Scherzer, Janik and Green, *Foreign Military Sales: A Guide to the United States Bureaucracy*, 13 Geo.Wash.J. of Int'l L. & Econ. 545, 555 (1979).

Neither the district court nor the parties have offered any explicit guidance regarding the extent to which the disclosure claims, if any, pertain to FMS rather than commercial sales.

⁹ In reviewing a dismissal for lack of subject matter jurisdiction, we review the pleadings and evidence in the light most favorable to plaintiff. See *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1095 (9th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 205, 66 L.Ed.2d 88 (1980).

¹⁰ To a certain extent, our discussion of why the Government is not a necessary party under Rule 19 applies here. Northrop is not claiming that the Government has misused proprietary information or that it has directed McDonnell to do so.

We leave that question for resolution on remand. To the extent that any disclosure claims involve FMS sales, § 2356 is the exclusive remedy. Northrop does not challenge that position. To the extent, however, that any disclosure claims involve commercial sales, § 2356 is inapplicable.¹¹

The Foreign Assistance Act defines "officer or employee," terms carried over from the Mutual Security Act of 1954, as "civilian personnel and members of the Armed Forces of the United States Government." *Id.*, § 644 at 515. The legislative history of the Act states that the section is a "rewrite and

¹¹ Section 2356 was originally promulgated as § 517 of the Mutual Security Act of 1951, Pub.L.No. 165, 65 Stat. 373, 382. That section referred to the "disclosure of information by reason of acts of the United States or its officers or employees." *Reprinted in* [1951] U.S. Code Cong. & Ad.Serv. 517,526. The available legislative history refers only to disclosure by the Government. *See* S.Rep. No. 703, 82d Cong., 1st Sess. (1951), *reprinted in id.* 2250 at 2298. The provision was carried over as § 506 of the Mutual Security Act of 1954, Pub.L. No. 665, 68 Stat. 832, 852. That section also referred only to Government disclosure. *Cf. Kaplan v. United States*, 153 F.Supp. 787, 790, 139 Ct.Cl. 682 (1957) (dismissing a claim under the section because the product manufactured for the Government was not used "in connection with the furnishing of any assistance in furtherance of the purpose of this Act"; noting that the Government assumes liability under the section for certain disclosures by "United States Government officials").

The section was reenacted in its present form as Section 606 of the Foreign Assistance Act of 1961, Pub.L. No. 87-195, 75 Stat. 424, 440. The Foreign Assistance Act authorized the President to "furnish military assistance . . . to any friendly country . . . by—(a) acquiring from any source and providing . . . any defense article or defense service. . . ." *Id.* § 503; *reprinted in* [1961] U.S. Code Cong. & Ad. News 470, 482-83. Specifically, it permitted the President to "furnish defense articles from the stocks of the Department of Defense" or enter into procurement contracts. *Id.* § 507 at 484. It did not mention export licenses for commercial sales. Therefore, "the furnishing or assistance under this Act" in section 606 (now § 2356) does not expressly include commercial sales such as McDonnell's.

simplification, without substantial change" of the previous version. S.Rep. No. 612, 87th Cong., 1st Sess. (1961), *reprinted in* [1961] U.S.Code Cong. & Ad. News 2472, 2501. It therefore does not appear that the addition of the term "agent" in 1961 broadened the scope of § 2356.

Neither the language nor the legislative history of § 2356 suggests that the section encompasses disclosure by Government contractors. Indeed, we are unable to find a single case in which a private contractor has been found to be an agent of the Government under § 2356. Even under general agency principles, procurement contractors are ordinarily independent contractors unless the contract expressly makes them the Government's agents. *See generally United States v. Township of Muskegon*, 355 U.S. 484, 486, 78 S.Ct. 483, 485, 2 L.Ed.2d 436 (1958); *Deltec Corp. v. United States*, 326 F.2d 1004, 1005 n. 1 & 1006-07 (Ct.Cl.1964).

McDonnell argues that § 2356 embodies the same policy as 28 U.S.C. § 1498 of (1976 & Supp.1980):¹² "to insulate contractors from lawsuits disruptive of the procurement process." H.R.Rep. No. 872, 82d Cong., 1st Sess. 1420 (1951). It also relies on *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct.Cl.1976), in arguing that § 2356 extended § 1498 to foreign sales. The language of the two sections, however, is very different.¹³ Moreover, both the legislative history that McDonnell quotes and the *Hughes* court were discussing the language

¹² Suit against the Government under § 1498 is the exclusive remedy for unlawful use of a patented invention by the Government.

¹³ For instance, in contrast to the "officers, employees, or agents" language of § 2356, § 1498 provides that:

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

28 U.S.C. § 1498(a) (1976) (emphasis added)

"by or for the United States" of § 1498. They did not address the disclosing parties encompassed within § 2356.

McDonnell argues that it is an agent of the Government because of the International Traffic in Arms Regulations ("ITARs"), 22 C.F.R. §§ 121.01 *et seq.* (subchapter M) (1981). These regulations provide that a State Department license is required for export of equipment on the United States Munitions List; the license may be denied in furtherance of world peace, national security, or foreign policy; and that State Department approval is required before opening marketing talks with a prospective foreign buyer. 22 C.F.R. §§ 123.01, 123.05(a), and 123.16(a) (1981). The regulations require that a proposed agreement regarding a license to manufacture abroad or the furnishing of technical assistance (the disclosure of technical data) relating to Munitions List items must be approved by the State Department; the agreement may be disapproved for the same reasons as above; and the sales pitch must be approved. 22 C.F.R. §§ 124.01, 124.06(a), and 124.12(a) (1981).

When the Government permits disclosures abroad, it does not concern itself with the commercial ramifications of the arrangement. The regulations make this explicit with respect to proposed manufacturing license and technical assistance agreements. For instance, the regulations on proposed manufacturing license and technical assistance agreements require each agreement to state that:

No liability shall be incurred by or attributed to the U.S. Government in connection with any possible infringements of privately owned patent or proprietary rights . . . by reason of the U.S. Government's approval of this agreement.

22 C.F.R. § 124.10(h) (1981). They also require the cover letter to state that State Department approval will not be construed "as constituting either approval or disapproval of any of the business terms or conditions between the parties to the agreement." 22 C.F.R. § 124.11(d) (1981). Finally, the regulations apply the same standards to the export of technical data. 22

C.F.R. §§ 125.03 n. 2, 125.03-.05 (1981). See generally Sherzer, Janik and Green, *supra*, 13 Geo.Wash.J. of Int'l L. & Econ., at 581-90. Therefore, McDonnell's contention that the ITARS confer agency status on it also fails.¹⁴ Accordingly, McDonnell is not the Government's agent in making commercial sales for purposes of § 2356 so as to justify dismissal of Northrop's complaint on the ground that its exclusive remedy is against the Government.

B. Joinder of the Government

1. Joinder under Fed.R.Civ.P. 19 entails a practical two-step inquiry.^{14a} First, a court must determine whether an absent party should be joined as a "necessary party" under sub-

¹⁴ 32 C.F.R. § 7.104.9(8) (1981) provides that the Government may "have or permit others" to disclose information in which it has unlimited rights. "Permitting" McDonnell to disclose information by granting it an export license, however, does not make it an agent of the Government under § 2356.

^{14a} Due to the rigid, formalistic approach taken by some early courts, Rule 19 was revised in 1966 to emphasize that the appropriate focus is on the practical ramifications of joinder versus nonjoinder. *Eldredge v. Carpenters* 46, 662 F.2d 534, 537 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 231, 74 L.Ed.2d 183 (1982). The Rule now provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

(b) Determination by Court Whenever Joinder not Feasible.

If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the

section (a). Second, if the court concludes that the nonparty is necessary and cannot be joined for practical or jurisdictional reasons, it must then determine under subsection (b) whether in "equity and good conscience" the action should be dismissed because the nonparty is "indispensable." See generally *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108-25, 88 S.Ct. 733, 737-46, 19 L.Ed.2d 936 (1968); *Eldredge v. Carpenters* 46, 662 F.2d at 537.

The district court concluded that the Government was "both necessary and indispensable," 498 F.Supp. at 1119, because: Northrop's claims "called into question" the Government's unfettered right to "designate the who, what, when and where of weapons system production," 498 F.Supp. at 1117; injunctive relief would "necessarily limit the United States Government in its F-18 procurement activities," *id.* at 1118; and relief would impinge on the Government's conduct of foreign relations by limiting the source of land-based F-18's for foreign buyers.¹⁵ The court apparently concluded that the Government could not be joined because Congress has not authorized such suits

absent person being thus regarded as indispensable. The factors to be considered by the Court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

¹⁵ Review of the district court's decision is complicated by its failure to articulate clearly the considerations underlying its conclusions as to each step in the Rule 19 inquiry. For example, after reciting the factors in subsection (b)'s test for an indispensable party, the court observed that Northrop "disclaims the necessity of joinder," a consideration pertinent to subsection (a). *Id.* at 1117-18.

The confusion that frequently accompanies joinder rulings is attributable in part to the degree to which the factors cited in Rule 19's two subsections overlap each other. Impairment of the absent party's ability to protect its interest (19(a)(2)(i)) is similar to the prejudice to

against the Government.¹⁶ *Id.* Our standard of review of the district court's decision is abuse of discretion. *Bakia v. County of Los Angeles*, 687 F.2d 299 (9th Cir.1982) (per curiam), and *Walsh v. Centeo*, 692 F.2d 1239 (9th Cir.1982). We hold that the court abused its discretion in holding that the government is a necessary party. Because, as discussed below, we conclude that the Government is not a necessary party to this action, we need not determine whether joinder is feasible, and, if not, whether the Government's presence would be indispensable.

Subsection (a) of Rule 19 defines two categories of parties that should be joined if feasible. If the Government fits within either category it would be a necessary party. *Eldredge*, 662 F.2d at 537; *A.J. Kellos Construction Co. v. Balboa Insurance Co.*, 495 F.Supp. 408, 414 (S.D.Ga.1980), *rev'd on other grounds*, 661 F.2d 402 (5th Cir.1981). We conclude that it does not.

To fit within the first category, it must appear that "complete relief" cannot be accorded between Northrop and McDonnell absent the Government's joinder. Rule 19(a)(1). *See generally* 3A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 19.07-1[1], at 19-128 (2d ed. 1982). This factor is concerned with consummate rather than partial or hollow relief as

the absent party consideration under subsection (b); risk of leaving a defendant exposed to inconsistent obligations (19(a)(2)(ii)) is similar to the prejudice to the defendant factor under (b); and whether complete relief can be accorded (19(a)(1)) is similar to the adequacy of relief inquiry under (b).

¹⁶ Although the district court's opinion does not discuss the feasibility of joining the Government, one of its conclusions of law provides that "no act of Congress would permit Northrop to bring *this particular action* against the United States" (emphasis added). Because the Government is not a necessary party, we need not address Northrop's contention that the court should have joined the Government in a claim under 22 U.S.C. § 2356(a)(2) (waiving sovereign immunity for disclosure of protected information) (*see* Section IIA, *infra*) rather than find it indispensable.

to those already parties, and with precluding multiple lawsuits on the same cause of action. *Advisory Committee's Note*, 39 F.R.D. 89, 91 (1966). McDonnell does not directly contend that the Government's absence would preclude the district court from being able to fashion meaningful relief as between the parties, and we discern no reason for so concluding.

McDonnell's necessary party argument is founded upon two contentions: (1) the Government would allegedly lose a valuable source of supply if Northrop were granted any of the relief it requests; and (2) any decree entered in Northrop's favor would allegedly expose McDonnell to conflicting obligations. McDonnell's two contentions track the alternative subparts (i) and (ii) of Rule 19(a)(2), concerning prejudice to the absent party or to those already parties. Subparts (i) and (ii) are contingent, however, upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action. *Cf. Central Council of Tlingit & Haida Indians v. Chugach Native Association*, 502 F.2d 1323, 1326 (9th Cir.1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975) (Secretary of the Interior not a necessary party to a boundary dispute between Native American groups because he claimed no protectable interest).

The Government is not a party to any of the teaming agreements, and has never asserted a formal interest in either the subject matter of this action or the action itself. On the contrary, the record reflects that the Government has meticulously observed a neutral and disinterested posture, and regards this as a private dispute. The Navy has declared its intent to respect the teaming relationship, and has consistently advised the parties to resolve their disagreements in accordance with law and their private agreements. McDonnell offers no cogent reason why we should second-guess the Government's assessment of its own interests.

A nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract. *See, e.g., Helzberg's Diamond Shops, Inc. v. Valley West Des*

Moines Shopping Center, Inc., 564 F.2d 816, 820 (8th Cir. 1977); *Trans Pacific Corp. v. South Seas Enterprises, Ltd.*, 291 F.2d 435, 436-37 (9th Cir.1961); 7 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1613, at 135 (1972). This rule is not inapplicable merely because the absent party happens to be the Government. See, e.g., *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir.1980); *Fidelity & Casualty Co. v. Reserve Insurance Co.*, 596 F.2d 914, 918 (9th Cir.1979); *R.C. Hedreen Co. v. Crow Tribal Housing Authority*, 521 F.Supp. 599, 608 (D.Mont.1981). The correlative rule that all parties who may be affected by a suit to set aside a contract must be present, see *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir.1975), cert. denied, 425 U.S. 903, 96 S.Ct. 1492, 47 L.Ed.2d 752 (1976), is inapplicable here because Northrop is not seeking to set aside or enjoin performance under any contract between McDonnell and the Government.

McDonnell correctly points out that this case differs from the usual commercial dispute in that the absent party, the Government, is involved with the agreements at issue, even though it is not a party to them. The Government prompted the parties to enter the teaming agreements and, due to its extensive involvement in the military procurement arena, exerts a tremendous influence on them. Although we have previously adjudicated disputes between federal defense contractors where the Government was not a party, see *Experimental Engineering, Inc. v. United Technologies Corp.*, 614 F.2d 1244 (9th Cir.1980); *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir.1961), we have found no decision directly addressing the necessity of joining the Government when such disputes are litigated.¹⁷ We are there-

¹⁷ The most useful decision appears to be *Coastal Modular Corp v. Laminators, Inc.*, 635 F.2d at 1108, where the Fourth Circuit held that the Navy was not a necessary party to a contract action between airport contractors merely because the defendant "theorize[d] the possibility that the Navy would institute suit against it."

fore reluctant to rely too heavily on the rules applicable to ordinary commercial contracts and will take a closer look at the nature of the Government's interest in this dispute.

McDonnell's contention that the Government's interests will be prejudiced—the controlling inquiry under Rule 19(a)(2)(i)—springs from the erroneous premise that Northrop is challenging the Government's rights in the data and technology surrounding the F-18 development effort and right to control weapons system production. First, neither Northrop's allegations regarding McDonnell's use of YF-17 derivative technology nor its requested relief would in any way challenge the Government's "unlimited rights"¹⁸ to use and dispense that data. The Government's rights in that data, although unlimited, were neither sole nor exclusive and did not divest Northrop of the residual right to continue to use the technology itself and to share it with other private parties. See *Regents of University of Colorado v. K.D.I. Precision Products, Inc.*, 488 F.2d 261, 264 (10th Cir.1973) (interpreting language identical to that in 32 C.F.R. § 7-104.9(a) [see note 14, *supra*]).

Second, Northrop seeks no relief from the Government and no relief against McDonnell that would preclude McDonnell from complying with any Governmental directive or from producing a particular aircraft. As Northrop represented below:

If the Government . . . goes to McDonnell and says "we have unlimited rights in this data and taking those unlimited rights and giving them to you we want you to do this," the Government [is] free to do that. They can go to Grumman, they can go to LTV, they can go to Lockheed. They have unlimited rights. That is not anything we are contesting here.

¹⁸ "Unlimited Rights" are defined in 32 C.F.R. § 7-104.9(a)(7) (1981) as the "rights to use, duplicate or disclose technical data or computer software in whole or in part in any manner and for any purpose whatsoever, and to have or permit others to do so."

It is undisputed that McDonnell may use the YF-17 derivative data in responding to a Government procurement request. Unlike other contractors, however, McDonnell would be liable to Northrop if, in electing to respond, it violated its antecedent promises to Northrop.

Focusing on Rule 19(a)(2)(ii), McDonnell argues that Northrop's construction of the agreements would deter McDonnell from responding to such a Government request by saddling it with inconsistent obligations, and, in so doing, would interfere with the Government's procurement prerogatives. To reach this conclusion, however, it would be necessary to make several assumptions that are unwarranted on this limited record and at this preliminary stage of the proceedings. We would have to hypothesize both that the Government will ask McDonnell to develop land-based F-18's and that, when presented with the opportunity to participate as prime contractor in such a procurement request, McDonnell would forego that opportunity because of its prior contractual agreements with Northrop. To conclude that such a hypothetical election by McDonnell would impair the Government's unlimited right to use F-18 technology, we would have to assume further that the Government has an enforceable expectation that a defense contractor like McDonnell will fill a procurement request.¹⁹ The Record is replete with evidence to the contrary. There are any number of commercial considerations, including existing contractual obligations, that routinely prompt defense contractors to decline to participate in a particular Government procurement offering. As Northrop cogently argues in its brief, a con-

¹⁹ McDonnell cannot avoid this fallacy in its argument by suggesting that the Government might ask it to modify the carrier-suitable features of the F-18A under the "changes clause" of its prime contract with the Navy. First, no such change order has been issued. Second, the mere existence of the changes clause found in most Government military contracts, does not permit a contractor to breach its preexisting contractual obligations to other private parties. See *Westinghouse Electric Corp. v. Garrett Corp.*, 437 F.Supp. 1301, 1338 n.53 (D.Md. 1977), *aff'd*, 601 F.2d 155 (4th Cir. 1979).

tractor's commercially based decision to forego a military contract does not impair the Government's unlimited rights in the desired product's technology or right to control military procurement activity.²⁰

We conclude that the Government's hypothetical interest in having McDonnell serve as prime contractor for land-based F-18's does not mandate joinder under Rule 19(a).²¹ Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19. *See Coastal Modular Corp.*, 635 F.2d at 1108; *Arthur v. Starrett City Associates*, 89 F.R.D. 542, 547 (E.D.N.Y. 1981); *Sierra Club v. Leslie Salt Co.*, 354 F.Supp. 1099, 1105 (N.D.Cal. 1972). The

²⁰ Northrop points out that:

The impact on the government that would result from an award of declaratory or monetary relief to Northrop in this case is no different from that which would occur if [McDonnell], when presented with the opportunity for a federal contract, determined that it had insufficient capacity to perform any resulting contract unless it diverted facilities and personnel currently dedicated to the production of DC-9's and DC-10's for its commercial airline customers. In such an event, [McDonnell] would be required to balance the value of the added federal business against the liabilities it would incur by abandoning its prior contractual commitments to the airlines. And if [McDonnell] elected to pursue the later-presented federal opportunity, the airlines would be entitled to seek declaratory and/or monetary relief under their contract with [McDonnell]. Clearly, the United States would not be indispensable to such litigation. To so hold would—contrary to all precedent—pervert Rule 19 by transforming it into a haven for sellers like [McDonnell] who, when they find it expedient or profitable, elect to disavow prior commitments by subsequently entering into contracts that are inconsistent with their previous contractual promises.

²¹ Any interest the Government may have in McDonnell's production efficiencies and sunk costs, if cognizable, is at most a disputed question of fact that was not addressed below and therefore does not justify dismissal at this juncture.

Government is not a necessary party to what is essentially a contract and antitrust action between private parties solely because the dispute arises in the regulated military aircraft industry. *Cf. Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981) (resolving an antitrust and securities law dispute between private manufacturers of military aircraft with no suggestion that the Government's joinder was necessary). Absent a more particularized and compelling governmental interest, private disputes arising within this important commercial sector should be governed by traditional Rule 19 principles. Finally, if Northrop eventually succeeds on any or all of its claims, a matter on which we express no opinion, we believe that adequate relief could be shaped that would neither impair a significant Government interest nor subject McDonnell to any greater inconsistent obligation than it freely assumed.

C. Failure to State a Claim

The district court held that the complaint failed to state a claim because the political question and act of state doctrines precluded judicial inquiry into the subject matter of this dispute. The act of state doctrine is essentially the foreign counterpart to the political question doctrine. Both doctrines require courts to defer to the executive or legislative branches of government when those branches are better equipped to handle a politically sensitive issue. *International Association of Machinists v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982). Neither doctrine is susceptible to inflexible definition, and both must be applied on a case-by-case basis by balancing a variety of factors. *Id.* at 1358-59. With that in mind, we turn to the case at hand.²²

²² In reviewing a dismissal for failure to state a claim, we construe the material allegations in the complaint as being true. *Benson v. Arizona State Board of Dental Examiners*, 673 F.2d 272, 275 n.7 (9th Cir. 1982).

1. Political Question: The district court construed the complaint as asking the court to decide "*WHO* will be the exclusive builder (prime contractor) for the carrier-suitable or land-based versions of the F-18 weapons system" and to be, in effect, "the super-procurer and sales licensor of a military weapons system." 498 F.Supp. at 1120. It held that the case therefore presented a nonjusticiable political question under *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). *Id.*

Baker contains several considerations that help identify a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding without an initial policy determination reserved for nonjudicial discretion; (4) the impossibility of deciding without expressing lack of respect for the coordinate branches of government; (5) unusual need for adherence to a political decision already made; and (6) the potentiality for embarrassment from multifarious pronouncements by various departments. 369 U.S. at 217, 82 S.Ct. at 710. See also *Goldwater v. Carter*, 444 U.S. 996, 998, 100 S.Ct. 533, 534, 62 L.Ed.2d 428 (1979) (Powell, J., concurring) (summarizing indicia of a political question). The district court did not identify which of the *Baker* factors suggests that Northrop's entire action presents a political question. McDonnell invokes the last three *Baker* factors because the Government approved McDonnell's sale of F-18's to Canada, has authorized it to export F-18 technology to several other countries, and has allegedly asked it to make a presentation about the F-18 to the Air Force and a Defense Department committee.²³

²³ Although the record offers little evidence of a Government request for such a presentation, and Northrop vigorously disputes it, we assume it to be true for purposes of this issue.

We discern no support for characterizing Northrop's claims as political questions regardless of which factors are considered. Northrop does not challenge the wisdom or legality of any governmental act or decision. Instead, it seeks to restrain and recover damages from McDonnell for the latter's allegedly improper tactics in marketing F-18's. The challenged activity by McDonnell was neither authorized nor directed by any branch of Government. The mere fact that the challenged conduct occurred in a regulated industry does not alone alter its private commercial character. The issues presented for trial are not political questions—they are legal issues, involving private commercial activity which the judiciary is uniquely equipped to resolve. Northrop's claims do not seek the kind of direct interjection of the judiciary into the Government's procurement activity that would transform this private suit into a political question. See *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973) (court supervision of National Guard training constituted a political question); *Sarnoff v. Connally*, 457 F.2d 809, 809-10 (9th Cir.), *cert. denied*, 409 U.S. 929, 93 S.Ct. 227, 34 L.Ed.2d 186 (1972) (action challenging war-power provisions of the Foreign Assistance Act presented a political question); *Rappeneck v. United States*, 509 F.Supp. 1024, 1028-30 (N.D.Cal.1980) (claim that President was negligent in responding to seizure of American cargo vessel by Cambodian gunboats dismissed as political question).²⁴

2. Act of State: Pursuant to the act of state doctrine, this nation's courts will not "sit in judgment on the acts of" another country. *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct.

²⁴ McDonnell's reliance on *Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981) and *Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981) is misplaced. In contrast to Northrop, the plaintiffs in *Agee* and *Rostker* directly challenged the propriety of decisions made by the President and Congress. *Agee* challenged the validity of the President's revocation of his passport. *Rostker* involved an equal protection challenge to the validity of the males only provision of the Military Selective Service Act.

83, 84, 42 L.Ed. 456 (1897). Even in private suits, American courts will not resolve issues requiring "inquiries . . . into the authenticity and motivation of the acts of foreign sovereigns." *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 110 (C.D.Cal.1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). The doctrine has no explicit fountainhead in our Constitution or statutes, and derives principally from the judiciary's desire not to interfere with the conduct of foreign policy by the political branches of government. *International Association of Machinists v. OPEC*, 649 F.2d at 1359; *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 605 (9th Cir. 1976). In determining whether the doctrine compels dismissal, courts must carefully "balance [the] relevant considerations." *Timberlane*, 549 F.2d at 606, 607 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804 (1964)). The justification for forbearance depends greatly on the importance of the issue's implications for our foreign policy. *Id.*

McDonnell argued below that Northrop's claims would require the district court to review the procurement actions of foreign sovereigns in order to decide whether McDonnell's alleged conduct was causally connected to Northrop's lost foreign F-18 sales. The court stated that "if" McDonnell was correct in its assertion, the doctrine mandated dismissal. 498 F.Supp. at 1121. The court failed, however, to determine whether McDonnell was in fact correct and never identified a foreign act of state that would require review to adjudicate Northrop's claims.

Northrop concedes that military procurement decisions by foreign sovereigns are acts of state. The issue here, however, is whether resolution of Northrop's claims would necessitate direct judicial inquiry into such decisions. We conclude that it would not.

Northrop's damage allegations pertain to McDonnell's private commercial conduct and are not inextricably bound up in any foreign act of state.²⁵ The claims relating to the increased costs associated with duplicating technology that McDonnell was allegedly contractually obligated to furnish Northrop will not require the court to inquire into any foreign procurement decisions because Northrop can establish the fact of damage without reference to lost sales by proof of increased costs. Northrop has alleged injury of a type and amount sufficient to avoid dismissal. See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60, 81 S.Ct. 365, 367-68, 5 L.Ed.2d 353 (1961) (per curiam). Whether Northrop can eventually establish the amount of damages without implicating foreign procurement decisions, and whether that implication is permissible, are disputed questions which we need not address at this stage of the proceedings. See *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 304 (3d Cir.1982); *Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir.), *reh. denied*, 599 F.2d 449 (1979), *cert. denied*, 445 U.S. 903, 100 S.Ct. 1078, 63 L.Ed.2d 318 (1980). The same conclusion applies to Northrop's contract and tort claims for monetary relief.

We decline to construe the act of state doctrine to shield all violators of private agreements that involve some foreign governmental act. As noted by the Fifth Circuit in reaching this same conclusion:

Precluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive depart-

²⁵ Although "seemingly commercial activity" can trigger act of state concerns, see *OPEC*, 649 F.2d at 1360 (alleged oil price-fixing by cartel of foreign nations), purely commercial activity ordinarily does not require judicial forbearance under the act of state doctrine. *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 698 96 S.Ct. 1854, 1863, 48 L.Ed.2d 301 (1976).

ment action. [Plaintiff] must only question that government's motivation to the extent of measuring its damage. No ethical standard is set by which the propriety of its decision is tested. Surely the limited nature and effect of determining the proportional cause of plaintiffs' damage allocable to defendants' conduct does not trigger the type of special political consideration protected by the act of state doctrine.

Id.

McDonnell's contention that Northrop's claims for injunctive relief are barred is also unpersuasive. Even if Northrop's harm from future misconduct would be measured solely by lost sales, there is no reason to extend the act of state doctrine to *future* decisions by foreign governments. The court need only find a likelihood that McDonnell's actions will cost Northrop *some* amount of future sales. That finding would not create the foreign policy tensions that the act of state doctrine was designed to avoid.

A comparison of this case with *OPEC* and *Timberlane*, this court's most comprehensive forays into act of state analysis, confirms that the doctrine is inapplicable here. The doctrine compelled dismissal in *OPEC* because the plaintiff directly sued a cartel of sovereign nations, charging them with violating this country's antitrust laws, and sought to enjoin and recover damages from the nations. 649 F.2d at 1361. In *Timberlane*, we refused to invoke the doctrine even though the activity complained of (conspiracy to monopolize Honduran lumber export business) primarily involved foreign citizens, took place in a foreign nation, and had the greatest impact on the foreign nation. We reasoned that the plaintiff did not seek to name any foreign nation or officer as a defendant and did not directly challenge the foreign nation's conduct in a way that would threaten relations with the country. 549 F.2d at 608. We emphasized that "there is no indication that the actions of the Honduran [government] reflected a sovereign decision that [plaintiff's commercial] efforts should be crippled or that trade with the United States should be restrained." *Id.*

Timberlane is clearly the more analogous decision. In contrast to the *OPEC* plaintiff, Northrop does not seek monetary or injunctive relief against any sovereign and does not ask the court to pass judgment on any foreign sovereign's act or policy. As noted in *Timberlane*, the act of state doctrine "does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government".²⁶ 549 F.2d at 606.

III

WORKSHARE CLAIMS

Northrop requested that McDonnell be enjoined from subcontracting to anyone else the share of work Northrop was entitled to under the teaming agreements and Navy subcontract. Neither the district court's opinion nor its Findings of Fact and Conclusions of Law address Northrop's workshare claims. The court's order stated that those claims "are moot and not ripe for determination in light of [McDonnell's] stipulation of November 28, 1979." That stipulation apparently involved the parties' respective share of the work generated by Canadian sales.

Northrop argues that the court erred in finding that the stipulation mooted its Canadian workshare claims and that, in any event, the workshare claims are not limited to Canada. McDonnell does not argue the mootness issue. It contends that the workshare claims were properly dismissed for absence of an indispensable party, lack of subject matter jurisdiction, and nonjusticiability, "regardless of whether [they] were moot."

Our disposition of the dismissal rulings relied on by McDonnell makes it necessary to address the mootness issue. On

²⁶ In a similar vein, the court noted that "mere governmental approval or foreign governmental involvement which the defendants had arranged does not provide a defense.: *Id. Accord, Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 47 S.Ct. 592, 71 L.Ed. 142 (1927).

remand, the district court should make specific findings and conclusions regarding the scope of the stipulation and the extent to which Northrop's workshare claims are mooted by it. If, as Northrop contends, the stipulation was purely *pendente lite* or was limited to Canadian sales, wholesale dismissal for mootness was clearly inappropriate.

IV

SUMMARY JUDGMENT

The district court granted McDonnell summary judgment on the grounds that: (1) the contract-responsibility clause of the Basic Agreement, as amplified in the August 26, 1976 Agreement, was *per se* unreasonable under section 1 of the Sherman Act; and (2) Northrop had failed to establish a *prima facie* case of attempt to monopolize under section 2 of the Sherman Act. We conclude that summary judgment was inappropriate on either ground.

Before turning to the specifics of the two issues, we note by way of overview that the summary judgment rulings reflect two basic inconsistencies. The first inconsistency pertains to the jurisdictional requirement of interstate commerce. The court held that no "trade or commerce" existed for section 2 purposes because the Government exercised absolute control over the relevant markets, yet, concomitantly, ruled that sufficient interstate commerce would be restrained by Northrop's interpretation of the contract-responsibility clause to justify holding the practice *per se* unreasonable under section 1. The second inconsistency stems from the court holding that there was nothing so unique about this practice or industry to warrant rule-of-reason analysis under section 1, but that this case is so unlike those cases where section 2 sanctions have traditionally been applied that the section was inapplicable here.

A. Applicable Standard

Summary judgment is appropriate under Fed.R.Civ.P. 56(c) only where there is no genuine issue of material fact and

the moving party is entitled to judgment as a matter of law. *Bank of California, N.A. v. W. H. Opie*, 663 F.2d 977, 979 (9th Cir. 1981); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 438-39 (9th Cir. 1979). This court has noted that "the showing of a genuine issue for trial is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law." *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir. 1981), *cert. denied*, 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed. 2d 109 (1982). In reviewing the record to make this determination, the court must draw all inferences in the light most favorable to Northrop, the party opposing the motion. *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). Although summary judgment is sometimes appropriate in antitrust litigation, *see, e.g., Thomsen v. Western Electric Co.*, 680 F.2d 1263, 1265 (9th Cir. 1982); *Ron Tonkin Gran Turismo*, 637 F.2d at 1381; *Thi-Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991 (9th Cir. 1980), it is generally disfavored, especially when motive or intent is at issue. *See, e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Betaseed, Inc. v. U. & I. Inc.*, 681 F.2d 1203, 1207 (9th Cir. 1982); *A. H. Cox & Co. v. Star Machinery Co.*, 653 F.2d 1302, 1305 (9th Cir. 1981); *California Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001, 1003 (9th Cir. 1981).

B. Restraint of Trade

Northrop challenges the district court's ruling that the "contract-responsibility" clause (quoted *supra* at 5-6) at issue in counts 1-3, 6, and 7 of Northrop's complaint is *per se* unreasonable as a market-allocation restraint of trade under section 1 of the Sherman Act. We conclude that the court erred in applying *per se*, rather than rule-of-reason, analysis in this novel context.

Generally speaking, the Sherman Act bans all arrangements that are adopted to reduce competition, or which, regardless of purpose, have a significant tendency to reduce competition. Thus, arrangements that are adopted for and tend to achieve other purposes are not condemned by the Act merely because they carry some incidental and inconsequential restraining effect on competition. L. Sullivan, *Antitrust*, § 63 at 166 (1977).

Although this determination is ordinarily made through rule-of-reason analysis—a process calling for thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition—certain agreements or practices are so “plainly anticompetitive,” *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568 (1977), and so “lack [] any redeeming virtue,” *Northern Pacific Railway v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), that they are conclusively presumed illegal without the need for detailed rule-of-reason analysis. Horizontal market division, the practice claimed to exist here, is one of four main categories of competitive restraints this court has held unreasonable *per se*. See *A. H. Cox & Co. v. Star Machinery*, 653 F.2d at 1305; *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). Nevertheless, even within this class of restraints, there are recognized circumstances where rule-of-reason analysis remains appropriate. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1978) (blanket licensing arrangement between horizontal competitors not *per se* illegal); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 821-24 (9th Cir.) (as amended) (temporal market allocation provision of lease drafted by horizontal competitors not *per se* illegal), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982).

Northrop argues that three such circumstances make rule-of-reason analysis appropriate here: (1) neither the exact type of teaming arrangement at issue in this case nor the military aircraft industry in general have been subject to prior antitrust scrutiny; (2) the arrangement actually enhanced competition by introducing a new competitor, McDonnell, into a market from which it was otherwise foreclosed; and (3) the contract-responsibility clause is an essential aspect of, and reasonable limitation upon, the agreement to exchange technology. We agree that the case involves novel antitrust considerations, and reject McDonnell's contention that this is simply a run-of-the-mill case of market allocation between horizontal competitors.²⁷ We shall discuss each of these factors supporting the rule of reason.

1. Judicial experience with the challenged conduct: This factor strongly supports application of rule-of-reason analysis. As recognized in *United States v. Topco Associates*, 405 U.S. 596, 607-08, 92 S.Ct. 1126, 1133-34, 31 L.Ed.2d 515 (1972), and recently reaffirmed in *Broadcast Music*, 441 U.S. at 9, 99 S.Ct. at 1557, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . ." Neither the district court nor McDonnell point to a single instance in which the military aircraft industry in general or Government prompted contractor teaming agreements in particular have received judicial scrutiny in a Sherman Act context.

McDonnell reads *Broadcast Music* too narrowly. McDonnell argues that because the contract-responsibility clause can be viewed as a simple market-splitting device and because

²⁷ In doing so, we note that the contract-responsibility clause at issue here differs significantly from the horizontal price-fixing arrangements the Supreme Court has uniformly subjected to *per se* condemnation. See, e.g., *Arizona v. Maricopa County Medical Society*, ___ U.S. ___, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (*per curiam*).

market-splitting devices have been held *per se* unreasonable in other contexts, *per se* treatment was appropriate here. According to McDonnell, a court need go no further than determining the general type of "practice" at issue in deciding whether to apply rule-of-reason analysis. This is precisely the type of "literalness" expressly condemned in *Broadcast Music*:

The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad.

....

"[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . ." See *White Motor Co. v. United States*, 372 U.S. 253, 263 [83 S.Ct. 696, 702, 9 L.Ed.2d 738] (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*." 562 F.2d, at 132. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade.

441 U.S. at 9-10, 99 S.Ct. at 1557.

In *Maricopa County*, the Court rejected the contention that it should not apply the usual *per se* rule against horizontal price fixing because the judiciary had little antitrust experience with the health-care industry. The Court rejected the argument because "'so far as price-fixing agreements are concerned, [the Sherman Act] establishes one uniform rule applicable to all industries alike.'" ____ U.S. at ____, 102 S.Ct. at 2476, quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940). The Court was careful to point out, however, that its decision "should not be confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule of

reason experience with the particular type of restraint challenged." — U.S. at —, 102 S.Ct. at 2476 n. 19 (emphasis in the original). We find no significant judicial rule-of-reason experience with either the particular practice or industry at issue here and therefore conclude that imposing a new *per se* rule would be premature.

2. Effect on competition: This is the most troubling and conceptually elusive of the three factors. Echoing the district court, McDonnell argues that the agreements destroy competition because they split the market into product categories—limiting Northrop to selling land-based F-18L's and McDonnell to selling carrier-suitable F-18A's. Although tenable, the argument is overly simplistic and is not an entirely accurate reading of either the agreements or the relief sought by Northrop.

The critical inquiry in determining whether *per se* condemnation should be extended to a previously unexamined business practice is whether the "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music*, 441 U.S. at 19-20, 99 S.Ct. at 1562 (citations omitted). *Accord*, *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1356 (9th Cir. 1982). In making this inquiry, we are mindful of the Court's admonition that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59, 97 S.Ct. 2549, 2561-62, 53 L.Ed.2d 568 (1977).

The agreements call for a joint effort by both "teammates" in the production and sale of *all* F-18's. The agreements allocate which party may act as prime contractor and which is principal subcontractor (depending on the type of F-18); they do not foreclose, at least in the traditional market-splitting sense, these competitors from competing in regard to their respective

versions of the jointly developed F-18 fighter concept. There is evidence, which must be accepted as true at this posture of the proceedings, that the agreements have not eliminated head-to-head competition in international markets between the two variants of the joint F-18 development effort—a surprisingly procompetitive occurrence in an industry typified by single-source products.²⁸ For example, Canada, the first international purchaser of an F-18, chose McDonnell's carrier-suitable F-18A over Northrop's land-based F-18 even though it intended to base the aircraft on land. The market appeal of carrier-suitable aircraft for land-based operation was demonstrated during the 1970's by McDonnell's successful marketing of its carrier-suitable F-4 "Phantom" for land-based use.

More important, however, is the fact that but for the teaming effort General Dynamics and other manufacturers of aircraft fitting the same general buyer needs as the F-18 would have had neither F-18 variant to compete against. Thus, not only do the agreements not preclude all competition between the parties' respective variants of the F-18, they actually foster competition by allowing both parties to compete in a market from which they were otherwise foreclosed.²⁹

Thus, McDonnell's impact-on-competition argument is misleading in the special context of this industry and practice. For although the agreements suppress competition between

²⁸ The record indicates that almost every military aircraft marketed by an American manufacturer since World War II has, for all practical purposes, been available from only a single source. One obvious reason for this phenomenon is the magnitude of the economic and technological bases necessary to enter the military aircraft markets where a single product such as the F-18 reflects nearly a decade of development and sells for over \$15 million each.

²⁹ Moreover, the agreements do not impinge upon the parties' unfettered right to develop and market aircraft suitable for any type of basing so long as the new aircraft are not "of basically the same configuration" as the team produced F-18 (see ¶ 3 of the Basic Agreement).

the parties in the sense that they designate which party will be the prime contractor for different versions of the F-18, there would be no competition but for the agreements. As noted by one deponent:

The agreements between Northrop and [McDonnell] do not have the effect of limiting competition to an extent greater than the naturally existing limitations brought about by . . . the Congressional mandate limiting the Navy to choosing between a General Dynamics YF-16 and a Northrop YF-17. Without the opportunity of teaming with Northrop, [McDonnell] would not have been able to participate in the Navy competition and would not be in a position to participate in sales of current generation YF-17 type fighters either in the United States or abroad.

Given this evidence, it would be a reversion to the kind of "formalistic line drawing" eschewed in *GTE Sylvania*, 433 U.S. at 58-59, 97 S.Ct. at 2561-2562, to hold this novel teaming arrangement a *per se* violation of the Sherman Act solely because it arguably has some characteristics of a horizontal restraint.

Where the effect on competition is equivocal, it is appropriate to examine the purpose of the restraint in deciding whether to apply the *per se* rule *Broadcast Music*, 441 U.S. at 19-20, 99 S.Ct. at 1562-1563. The teaming effort at issue here was done at its customer's request (the Government). The undisputed purpose of the teaming effort was to develop a particular weapons system desired by the Government. There is evidence that the contract-allocation clause was included to avoid repeating a previous military-aircraft contracting "fiasco"³⁰ that occurred due to lack of teaming, not to suppress competition. Thus, viewing the evidence in the light most favorable to Northrop, the agreements are not the sort of "naked restraint of trade with no purpose except stifling competition," *White*

³⁰ This occurred when a single contractor was unable to resolve the conflicting design demands of producing variants of a single aircraft for both the Air Force and Navy.

Motor Co., 372 U.S. at 263, 83 S.Ct. at 702, for which *per se* condemnation is appropriate.

We note by way of conclusion on this point, without deciding on the basis of the incomplete record before us, that there is a question as to whether it even matters if the agreements foreclosed some competition between Northrop and McDonnell. In distinguishing the price-fixing practice fashioned by the health-care foundation in *Maricopa County* from the blanket licenses in *Broadcast Music*, the Court stated that:

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.

Maricopa County, ____ U.S. at ____, 102 S.Ct. at 2479-80. As the Court notes, affiliated businesses cannot be held to conspire with each other where they function as essentially a single economic unit. *Accord*, *Murray v. Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.) (*per curiam*), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2905, 73 L.Ed.2d 1314 (1982). *See also* *Thomsen v. Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir. 1982). No adverse effect on competition need be shown here if it develops on remand that, despite the disavowal of a joint venture contained in the agreement, Northrop and McDonnell should be viewed as "teammates" constituting a single economic unit for purposes of the F-18 market.

3. Limitation upon license of technology: As an additional basis for holding *per se* treatment inappropriate, Northrop argues that the agreements are reciprocal licenses of technology and that the contract-responsibility clause is a reasonable use limitation. Reciprocal license agreements are not *per se* violations if the technology was otherwise unobtainable by the licensee (McDonnell) and the use limitation is "reasonable." *A & E Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 715 (9th Cir. 1968).

McDonnell argues that the YF-17 technology transferred by Northrop was otherwise available to McDonnell, albeit in less useful form, because the Government had purchased unlimited rights in such technology. McDonnell argues further that the use limitations sought by Northrop are unreasonable because: (1) they are broader and of longer duration (arguably for as long as F-18's can be marketed) than is necessary to protect Northrop's legitimate interests; (2) the F-18 product they are sought to be imposed on is far different from the "paper" technology and YF-17 prototype technology provided by Northrop; (3) the Government provided the business opportunity (*i.e.*, the chance to compete for the Navy contract), not Northrop; and (4) territorial restraints are unreasonable where the parties receive their *quid pro quo* in the mutual exchange of valuable information.

The fatal weakness in McDonnell's argument is that, although advanced in support of summary judgment, it hinges on bitterly contested facts. Also, McDonnell's position regarding the availability of the technology appears somewhat disingenuous—for if the technology was readily obtainable and usable, why do the memoranda by McDonnell's top executives indicate the necessity of teaming to obtain the technology? Although Northrop's licensing theory alone is probably an insufficient reason to require rule-of-reason analysis, it does add weight to the other factors, especially the argument that the antitrust implications of such teaming/technology/licensing arrangements in the military aircraft industry are *sui generis*.

C. Attempt to Monopolize

Northrop contends that McDonnell breached the agreements in such a manner as to attempt to monopolize the F-18 market.³¹ McDonnell argues that even if its conduct contravened the terms of the agreements, there was sufficient

³¹ See footnote 6 *supra*, and accompanying text for a more specific description of Northrop's claims.

governmental involvement by regulation and licensing of foreign sales efforts to support dismissal.

The parties characterize the district court's ruling very differently. Northrop contends that the court held that McDonnell's conduct in the F-18 markets was "immune" from section 2 of the Sherman Act because the military aircraft industry is subject to such pervasive federal regulation. McDonnell argues that the ruling is based, not on an immunity theory, but, rather, on the conclusion that two of the requisite elements of attempted monopolization are absent—namely, "dangerous probability of success" and "monopolistic intent."

Careful study of the district court's opinion and findings fails to disclose the exact basis for the ruling. The truth appears to lie somewhere between the extremes advocated by the parties.

The most tenable reading of the district court's opinion is that, although the court based its decision on the pervasive role of the government in the military-aircraft industry (rather than on the absence of the elements of attempt to monopolize), it did not squarely base its decision on immunity grounds.³² The court appears to have reasoned that the Government so controls the normal competitive process—from the inception of the F-18 design to its eventual marketing—that no "trade or commerce" as defined by the Sherman Act exists.³³ The district court's ruling is erroneous regardless of whether it is evaluated

³² This reading of the decision is corroborated by the absence of any direct immunity analysis or case law references in the opinion and by the fact that McDonnell did not explicitly argue for immunity in the lengthy memorandum it submitted in support of its motion for summary judgment.

³³ In the district court's words:

The concern of product and geographic market from the traditional antitrust viewpoint becomes unimportant here for one very basic reason. The United States Government has the abso-

as being based on "trade or commerce," "immunity," or "failure to prove a prima facie case" grounds.

1. Interstate commerce: Viewing the record in the light most favorable to Northrop, we cannot conclude as a matter of law that Northrop's section 2 claim fails for lack of a sufficient nexus with interstate commerce. Neither party disputes the district court's findings that the relevant product market is the "F-18 weapons system" and that the relevant geographic market is "arguably the world." 498 F.Supp. at 1123. The fact that the Government exercises significant control over the entry of private parties into these markets does not mean that there is no trade or commerce involved in competing in such markets. As noted by Northrop, there is undisputed evidence that the F-18 is being assembled in at least two different states, using materials and components shipped by vendors from all over the country and world. The Supreme Court has repeatedly observed that, consonant with the broad purposes of the anti-trust laws, almost any activity that has "interstate incidents"

lute and over-riding potential of the product that brings these parties into vitriolic conflict.

What strikes the Court under such circumstances is that there is not the "trade or commerce among the several States, or with foreign nations" essential to antitrust concerns of monopolization including the critical inquiry here—attempt to monopolize. The United States Government *is the market* concerned with production and distribution of weapons systems for governmental military establishments. As such, this differs from the basic thrust of antitrust laws applicable to governmental procurement practices in competition with consumer enterprises buying goods generally available in the marketplace.

. . . No single group of producers has any power to expand a market share beyond that considered by the United States Government in the implementation of domestic defense and foreign policy which is in the best interest of its citizens.

Political considerations aside, the monopoly, if any, enjoyed or threatened by MDC is a governmental creation outside the reaches of the Sherman Act Section 2.

498 F.Supp. at 1123 (footnote omitted) (emphasis is in the original).

satisfies the Sherman Act's jurisdictional requirement. See, e.g., *McClain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). Accord, *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 827 (9th Cir. 1981) (need only affect a "not insubstantial" amount of interstate commerce).

The fact that the Government is the sole domestic purchaser and regulates foreign F-18 sales does not mean that no market exists ~~which~~ a competitor can attempt to monopolize. A manufacturer can attempt to monopolize a market by eliminating competition through predatory actions regardless of the product's sophistication and the limited number of its potential customers. The record does not indicate as a matter of law that the military aircraft industry enjoys some sort of natural monopoly that renders inapplicable the premise of the antitrust laws that competition will assure the consumer the best product at the lowest price.

The Record is replete with evidence regarding the competitive nature of the military aircraft industry. The Air Force and Navy competitions alone are evidence of the competitive process fostered by the Government to ensure its choice of the best weapons system at the lowest cost. In foreign F-18 markets, the Government's role is limited to determining what technologies may be exported to what countries. Once this determination is made, the Government allows the foreign buyer to choose freely between the competing offerings of exportable technologies.

2. Implied immunity: To the extent, if any, that the district court's decision can be viewed as a determination that Congress intended to confer blanket antitrust immunity on private conduct in the military aircraft industry by virtue of its extensive regulation of that industry, the decision is in error. Although there are no reported antitrust decisions involving

this industry, treatment of the immunity question in regard to other regulated industries is instructive.³⁴

Courts have generally framed the immunity issue in terms of whether Congress intended to repeal the antitrust laws with respect to the particular industry when it enacted the regulatory scheme. *Phonotele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 726, 731-32 (9th Cir. 1982) (as amended). See generally Comment, *The Application of Antitrust Law to Telecommunications*, 69 Calif.L.Rev. 497, 505-14 (1981). Antitrust immunity is disfavored and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *National Gerimedical Hospital v. Blue Cross of Kansas City*, 452 U.S. 378, 388, 101 S.Ct. 2415, 2421, 69 L.Ed.2d 89 (1981), quoting *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20, 95 S.Ct. 2427, 2442-43, 45 L.Ed.2d 486 (1975). Pervasive regulation of an industry alone is insufficient to confer blanket immunity on every action taken within the industry. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75, 93 S.Ct. 1022, 1027-28, 35 L.Ed.2d 359 (1973); *United States v. R.C.A.*, 358 U.S. 334, 346, 79 S.Ct. 457, 464, 3 L.Ed.2d 354 (1959). Immunity is especially disfavored where the antitrust implications of a business decision are neither compelled nor explicitly

³⁴ In looking at the treatment accorded other regulated industries, we are cognizant of Professor Sullivan's warning that:

It is important to recognize that there is no single conception which defines the scope of the exemption for a regulated industry. Although one can draw on case law from one industry for guidance as to outcome in another, there are, in a sense, as many sets of exemption doctrines as there are industries subject to state or federal regulation. In each industry the process of accommodating regulatory doctrine to antitrust doctrine is responsive to particulars such as those here referred to and, in some degree no doubt, to the degree of confidence which the court has in the quality of the regulatory performance by the particular regulatory agency.

Antitrust, supra, § 239 at 743-44.

approved by a governmental regulatory body. *Gerimedical Hospital*, 452 U.S. at 389, 101 S.Ct. at 2421-22; *National Association of Securities Dealers*, 422 U.S. at 730-34, 95 S.Ct. at 2448-50; *Gordon v. New York Stock Exchange*, 422 U.S. 659, 689-90, 95 S.Ct. 2598, 2614-15, 45 L.Ed.2d 463 (1975). Immunity from the antitrust laws is justified only where necessary to ensure that the regulatory scheme works, and even then only to the minimum extent necessary. *Silver v. New York Stock Exchange*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963).

Applying these standards to the present case demonstrates the inappropriateness of granting blanket immunity, especially at the summary judgment stage. Although both McDonnell and the district court speak at length about the extensive matrix of federal regulations under which the military aircraft industry operates, neither points to a single instance in which the predatory conduct alleged by Northrop was either compelled or directly approved by a governmental body.

As we noted in rejecting a similar immunity claim in *Phonotele*:

Antitrust immunity is not conferred by the bare fact that defendants' activities might be controlled by an agency having broad powers over their conduct. There is no general presumption that Congress intends the antitrust laws to be displaced whenever it gives an agency regulatory authority over an industry . . . the area of immunity from antitrust laws is not coterminous with areas of agency jurisdiction or agency expertise.

664 F.2d at 729 (citations omitted). A regulatory mandate sufficient to confer implied antitrust immunity may in some cases exist where there is explicit congressional approval of the challenged conduct and its ultimate anticompetitive effect, and there is no inconsistency or "plain repugnancy" between the conduct and the express policies of the regulating body. *Id.* at 731-32. As in *Phonotele*, no such mandate is evident here.

The principal regulatory provisions pertaining to the military aircraft industry are the International Security Assistance and Arms Export Control Act ("ISAAEC Act"), 22 U.S.C. §§ 2751 *et seq.*, implemented, *inter alia*, by the International Traffic In Arms Regulations ("ITARS"), 22 C.F.R. §§ 121.01 *et seq.* (1981), and the Armed Services Procurement Act ("ASP Act"), 10 U.S.C. §§ 2301 *et seq.*, implemented by ASP Regulations ("ASPR"), 32 C.F.R. §§ 1-100 *et seq.* (1981). These provisions contain no affirmative indication that Congress intended to modify or eclipse the application of the antitrust laws to the military aircraft industry. Indeed, there are several indications that Congress intended private conduct in the industry to be subject to the antitrust laws. For instance, the ITARS require the inclusion of a clause in all technical assistance agreements that expressly acknowledges that license approval by the Office of Munitions Control is not to be construed as "passing on the legality of the agreement from the standpoint of antitrust laws." 22 C.F.R. § 124.11(d) (1981). Similarly, the ASP Act provides that a military procuring agency must notify the Attorney General whenever the agency has reason to believe that a "violation of the antitrust laws" has occurred. 10 U.S.C. § 2305(d). Finally, ASPR § 4-117, which describes and authorizes "contractor team arrangements" and was the basis for the agreements now in issue, provides that "[t]hese [teaming] policies do not authorize arrangements in violation of anti-trust statutes . . ."³⁵ ASPR § 4-117(b).

The Court held in *Otter Tail* that because the regulatory scheme in question preserved the right of voluntary action by private actors, its pervasiveness could not be construed to

³⁵ Another factor militating against immunity is the apparent inadequacy or nonexistence of agency structures to remedy anticompetitive behavior in the military aircraft industry. See *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 224, 86 S.Ct. 781, 787, 15 L.Ed.2d 709 (1966), modified, 383 U.S. 932, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *Phonotele*, 664 F.2d at 734-35. See also, *Comment, supra*, 69 Calif.L.Rev. at 511.

mean that the scheme was intended to supplant the antitrust laws. 410 U.S. at 373, 93 S.Ct. at 1027. A similar conclusion is warranted in this case. Where, as here, the challenged conduct is the product of the regulated business' independent initiative and choice, it is properly subject to antitrust scrutiny. *Phonotele*, 664 F.2d at 735 n. 49.

3. Prima facie case of attempt to monopolize: In addressing this issue, it is appropriate to bear in mind the admonition that summary judgments are most disfavored in antitrust cases where, as with this issue, "motive and intent play leading roles." *California Steel & Tube*, 650 F.2d at 1003. At least two elements of proof are indispensable to make out a prima facie case of attempt to monopolize: (1) specific intent to control prices or destroy competition, and (2) predatory conduct designed to accomplish that unlawful purpose. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 669 (9th Cir. 1980); *Greyhound Computer Corp. v. IBM Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). Although this court has periodically stated that dangerous probability of successful monopolization is also an indispensable element, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir.) (as amended), *petition for cert. filed*, ____ U.S. ____, 103 S.Ct. ____, 74 L.Ed.2d ____, 50 U.S.L.W. 3998.03 (U.S. June 11, 1982) (No. 81-2289); *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978), there is also Ninth Circuit authority for the view that probability of success is merely circumstantial evidence of intent. E.g., *Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982); *Blair Foods, Inc.*, 610 F.2d at 669; *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964).³⁶ We need not add further fuel to

³⁶ The significance of the dangerous-probability-of-success inquiry "has been controversial . . . within this circuit." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981).

the controversy by adding our opinion regarding the inquiry's proper significance, because, as discussed below, there was sufficient evidence of McDonnell's probability of success to avoid summary judgment. Finally, evidence of market power, while not essential, may suggest the existence of specific intent to monopolize. *Janich Bros.*, 570 F.2d at 853. The interplay between these elements is exhaustively discussed in *Continental Baking*, 668 F.2d at 1027-31 ("Each element interacts with the others in significant and unexpected ways", *id.* at 1027).

Although specific intent may be demonstrated by direct evidence of unlawful design, if corroborated, *Continental Baking*, 668 F.2d at 1028, intent is, for practical reasons, more commonly proven through circumstantial evidence such as by inference from predatory conduct and market power. *Forro Precision*, 673 F.2d at 1059; *California Computer Products v. IBM Corp.*, 613 F.2d 727, 736-37 (9th Cir. 1979). The combination of direct and circumstantial evidence of McDonnell's intent was sufficient to avoid summary judgment. The memoranda prepared by top McDonnell executives offer strong direct evidence of McDonnell's alleged intent to monopolize. The record also contains evidence that McDonnell possesses great leverage in the relevant market and, through its allegedly predatory actions, has a dangerous probability of successfully monopolizing that market. These latter factors offer additional evidence in support of Northrop's allegation of monopolistic intent. See *Blair Foods*, 610 F.2d at 669.

Northrop's assertions in the pleadings of predatory conduct are also adequate to avoid summary judgment. We cannot accept McDonnell's contention that its alleged breaches of the agreements, fraud in the inducement, and various other unfair practices could not be found predatory in the circumstances of this case. The alleged activity is clearly conduct "without legitimate business purpose." *Janich Bros.*, 570 F.2d at 853. McDonnell's argument is unpersuasive for two reasons. First, McDonnell appears to concede that this alleged conduct would be predatory if, as we have already determined, it enjoyed

market power. See *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S. Ct. 1369, 67 L.Ed.2d 348 (1981). Second, McDonnell focuses too closely on each of the individual practices complained of without reference to the intent motivating them or to their overall effect on Northrop's ability to remain McDonnell's principal competitor in the F-18 market. Cf. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962) (plaintiff should be given "the full benefit of [its] proof without tightly compartmentalizing the various factual components. . .").

V.

MCDONNELL'S CROSS-APPEAL

McDonnell concedes that most of its counterclaim is a "mirror image" of Northrop's complaint and that the disposition of one should be consistent with the other. The disposition of the motions to dismiss and for summary judgment of Northrop's complaint dictated that the counterclaim be treated similarly in that it was subject to the same perceived flaws. In light of our reversal of the district court's rulings on Northrop's claims, it is necessary to remand for further consideration of the counterclaim.³⁷

VI

CONCLUSION

We reverse the district court's dismissal and summary judgment rulings as to Northrop's complaint and McDonnell's coun-

³⁷ In the two limited aspects of the counterclaim that can arguably be construed as non-mirror images of Northrop's claims, McDonnell essentially sought an affirmative declaration of what the court held below. Had we affirmed the district court in regard to Northrop's complaint, there may have been some justification for treating those two claims as non-mirror images. Given the present posture of the case, however, summary treatment of those aspects of the counterclaim is unwarranted.

terclaim; affirm the denial of the motion to modify finding of fact #31;¹⁸ and remand the matter for further proceedings consistent with this opinion.

REVERSED, in part; AFFIRMED, in part; and REMANDED.

¹⁸ McDonnell contends that it was clearly erroneous for the district court to strike the words "Northrop claims that" from the beginning of the second sentence of McDonnell's proposed finding of fact #31. The finding goes on to say that both parties intended the agreements to limit McDonnell to marketing carrier-suitable aircraft and Northrop to land-based aircraft. The district court denied McDonnell's motion to reinstate the deleted phrase. Although conceding that the phrase "is not material to the [district] court's orders", McDonnell argues that the deletion is inconsistent with other findings that the parties intended different interpretations of the Agreements and sought different relief based upon their respective interpretations.

McDonnell's objection to the deletion is apparently aimed at protecting itself from being caught in contradictory positions in responding to Northrop's claims and in pressing its own counterclaims. Our disposition of this appeal renders this fear more illusory than real. For this and other reasons, we find no abuse of discretion.

ORDER AMENDING OPINION OF NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5165 &
81-5172

NORTHROP CORPORATION,
Plaintiff/Appellant/Cross-Appellee,
v.

MCDONNELL DOUGLAS CORPORATION,
Defendant/Appellee/Cross-Appellant.

ORDER

Before: POOLE and BOOCHEVER, Circuit Judges, and
SOLOMON,* Senior District Judge.

IT IS HEREBY ORDERED that the opinion in
the above entitled case, reported at 700 F.2d 506, be
amended as follows:

1. Page 519, column 1, paragraph 1, between
"Id." at line 3 and "Because" at line 4, insert:

Our standard of review of the district court's decision is
abuse of discretion. *Bakia v. County of Los Angeles*, 687
F.2d 299 (9th Cir. 1982) (per curiam), and *Walsh v. Cen-
teio*, 692 F.2d 1239 (9th Cir. 1982). We hold that the court
abused its discretion in holding that the government is a
necessary party.

2. Page 529, column 1, paragraph 3, at line 8, insert a
period after "Government", deleting that portion of the sen-
tence now reading ", and with the antitrust approval of the
Government's legal staff."

* Honorable Gus J. Solomon, Senior United States District Judge
for the District of Oregon, sitting by designation.

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
C. D. CALIFORNIA

Civ. A. No. 79-4145-R.

NORTHROP CORPORATION,

Plaintiff,

v.

McDONNELL DOUGLAS CORPORATION,

Defendant.

Overton, Lyman & Prince, Peter Brown Dolan, Frederick A. Clark, Los Angeles, Cal., Crowell & Moring, Eldon H. Crowell, W. Stanfield Johnson, Washington, D.C., Sheppard, Mullin, Richter & Hampton, Don T. Hibner, Jr., William M. Elliott, Robert B. Watts, Jr., Northrop Corporation, Los Angeles, Cal., for Northrop.

Bryan, Cave, McPheeters & McRoberts, George S. Hecker, Robert F. Scoular, Charles A. Weiss, Francis M. Gaffney, Los Angeles, Cal., St. Louis, Mo., Kadison, Pfaelzer, Woodard, Quinn & Rossi, John J. Quinn, Richard K. Simon, Ellen B. Friedman, Los Angeles, Cal., for McDonnell Douglas.

OPINION

REAL, District Judge.

Plaintiff NORTHROP CORPORATION (NORTHROP) filed suit complaining in eight causes of action of its First Amended Complaint that defendant McDONNELL DOUGLAS CORPORATION (MDC) has violated an agreement in which NORTHROP would have the exclusive sales rights of the F-18 aircraft of suitable configuration for land operation and MDC would limit its sales to F-18 aircraft that are "carrier-suitable." NORTHROP asks for injunctive relief and damages resulting from MDC's alleged (1) violation of this agreement;

(2) misappropriation of NORTHROP's property; (3) fraud in the inducement of a Teaming Agreement and Basic Agreement; (4) attempt to monopolize the F/A-18A and the F-18L fighter aircraft market; and (5) unfair competition. In addition NORTHROP seeks a declaration of the respective rights of the parties under its Basic Agreement of June 27, 1975 with MDC, an accounting of the profits earned by MDC by reason of its fraudulent acquisition of NORTHROP's proprietary technology and breach of trust and recovery in quantum meruit for materials and services rendered to MDC for which NORTHROP has not been compensated.

MDC has moved to dismiss the First Amended Complaint on various grounds and alternatively moves for Summary Judgment. Each ground will be handled separately in this opinion although the lines between dismissal and summary judgment on the various counts may occasionally become somewhat blurred.

The Odyssey into this litigation begins in NORTHROP's Think Tank in 1965. In that year NORTHROP began development of a new lightweight supersonic fighter aircraft for purchase by the United States and sale in the international weapons system market. The design efforts produced a P-530 and P-630 aircraft concept in 1969 prompting the United States Air Force to undertake an Air Combat Fighter, or "ACF," Program for prototype development of lightweight fighter aircraft.

NORTHROP submitted a proposal to the Air Force based upon its P-530 design and in 1972 was given a contract for a prototype ACF aircraft denominated the YF-17. NORTHROP was paid approximately 39 million dollars for its work on two prototype YF-17 aircraft. Simultaneously GENERAL DYNAMICS CORPORATION was awarded a prototype contract for its proposed YF-16. Both of these development contracts were limited to design of an airplane for land-based use. MDC did not enter the competition for Air Force research and development contracts relying on its own assessment that its

F-15 and F-4 would adequately fill its competitive needs through the 1980s. Any development by MDC in the meantime was limited to improving the technology embraced within its F-15 design.

The United States Navy in 1973 had decided to develop a new lighter weight aircraft for its carrier fleet. Requested funding for what was to be named as the Navy Air Combat Fighter of NACF program¹ brought Congress to the realization that the development of individual technology between the various armed services utilizing aircraft was not cost efficient. By directive Congress required the Navy to make maximum use of the paid-for technology developed in the ACF program. With that kind of a stricture upon the Navy's development needs the data, technology and hardware of only two aircraft was available for use in the NACF competition i.e., NORTHROP's YF-17 and GENERAL DYNAMICS' YF-16.

In June 1974 the Navy published to the aerospace industry a pre-solicitation notice with a set of requirements for its NACF competition. Congress had severely limited Navy funding to supplementing YF-16 and YF-17 technology and so the Navy was required to look to what a MDC executive described as the only "crap game in town." What the Navy faced was a crap game in which the two potential participants did not know how to play. As a way out of its dilemma the Navy used its persuasive abilities to convince both NORTHROP and GENERAL DYNAMICS to look to a partnership with some aircraft manufacturer that had experience in the design, development and manufacture of carrier-suitable aircraft. This brought on the industrial courtship and marriage of NORTHROP and MDC. Who was the pursued and who the pursuer is disputed by the parties. The undisputed fact is a neutral view that they desperately needed each other if they—jointly and severally—were to succeed in tapping the great potential of the opportunity

¹ This program started with the acronym VFAX. It was later changed to NACF. For the purposes of clarity the entire program will be referred to by its last acronym: NACF.

presented by the Navy's need for a new aircraft to meet the military seapower needs of the nation.

On October 2, 1974 NORTHROP and MDC executed a Teaming Agreement "to team for the purpose of developing, proposing and producing a USAF derivative of the YF-17 (USAF ACF) and a carrier-suitable version of the YF-17 (USN ACF) to satisfy U.S. Navy VFAX requirements." This agreement by its own terms was to terminate on June 30, 1975 unless mutually extended.

The team effort had a dual purpose. It was to be a joint effort of NORTHROP and MDC to successfully design fighter aircraft for both the Navy and Air Force utilizing derivatives of the YF-17 technology developed by NORTHROP. To fulfill the obligations of the Teaming Agreement NORTHROP pursued the Air Force ACF competition while MDC turned its efforts to the design responsibilities involved in the Navy NACF program.

As competition goes there are winners and losers. In January 1975 NORTHROP found itself losing the Air Force ACF competition to GENERAL DYNAMICS. MDC was notified on May 2, 1975 that it had won the Navy NACF competition. This latter event was the birth of the F-18.

In what has been denominated the "Basic Agreement" executed June 27, 1975 the parties agreed:

3. Contract Responsibilities

- (a) . . . that MDC will be prime contractor in connection with contracts with the U.S. Navy for the development of the F-18 and for the production of those F-18 aircraft purchased by the U.S. Navy for its own use. Furthermore, in the event a foreign customer desires to procure from MDC . . . F-18 aircraft of basically the same configuration . . . MDC will be prime contractor . . .
- (b) NOC may elect to be prime contractor on any or all contracts for the development and production of air-

craft derived from the NOC YF-17 other than those referred to in paragraph (a) above.

It is this market sharing provision that underlies the present disputes between NORTHROP and MDC.

The Basic Agreement mutually obligated MDC and NORTHROP to exchange design, design analysis and test data on the F-18 and YF-17 technology. The parties made clear that the relationship created was not "in any manner intended to create a joint venture or otherwise incur or imply joint or several liability."

In answer to the award of the Navy NACF competition to the MDC-NORTHROP team the government awarded a prime contract in excess of \$1.063 billion dollars to MDC to fully design and develop the aircraft—the F-18. NORTHROP was awarded a subcontract by MDC requiring NORTHROP to provide "personnel, materials, services, facilities, logistics support, data and management required to design and develop, fabricate, qualify, test, document and deliver the . . . F-18 major assemblies/equipment in accordance with MACAIR Statement of Work (SOW) No. WS-F-18-27."

New vigor had been infused into the NORTHROP YF-17 effort. In late 1975 and early 1976 it began an effort to interest the Shah of Iran in becoming the first customer of a YF-17 derivative day fighter. The Navy's concern that NORTHROP's Iranian effort might dilute its own F-18 development prompted a new agreement between MDC and NORTHROP on August 26, 1976.

The agreement of August 26, 1976 reaffirmed the June 27, 1975 agreement. It also provided that NORTHROP "has elected to design, develop and produce for sale to the United States and to foreign governments all aircraft designed only for land-based operations which are derived from the YF-17." This election was in answer to the demands of the Navy that the parties agree upon a Foreign Military Sales (FMS) Master Plan. It also assured the Navy that NORTHROP's development of a day fighter would not interfere with the design and development of the now designated Navy's F-18-A.

The design of the F-18 now completed and ready for production, MDC turned to new markets to make sales. These market efforts involve on-going presentations in what NORTHROP claims are violations of the Basic Agreement between the parties to Canada, Israel, Spain and Australia. Perceiving that its claimed exclusive position in furnishing land based F-18s to the world market was about to evaporate with MDC's successful effort in Canada, NORTHROP filed suit and in its First Amended Complaint alleges eight causes of action variously described as acts of fraud, systematic breaches of contract, wrongful economic coercion, concerted refusals to deal, unfair competition and industrial espionage.

Both parties make extravagant claims as to its own contribution to development of the F-18. Although the truth may lie somewhere between these claims, this Court need not make that determination to dispose of the motions before it.

MDC has now moved for dismissal on the grounds that 1.) there is a failure to join an indispensable party i.e., the United States; 2.) the court lacks subject matter jurisdiction; 3.) failure to state a claim upon which relief can be granted because of nonjusticiable political and foreign policy questions exclusively within the jurisdiction of the executive and legislative branches of government; and 4.) NORTHROP fails to state a claim upon which relief can be granted under Sec. 2 of the Sherman Act.

MDC also asks for summary judgment on the grounds that 1.) the relief requested in the First, Second, Third, Sixth and Seventh causes of action would constitute an illegal restraint of trade in violation of Secs. 1 and 2 of the Sherman Act. NORTHROP cannot establish injury in fact in its Fourth, Fifth, Sixth, Seventh and Eighth causes of action.

1. FAILURE TO JOIN AN INDISPENSABLE PARTY- THE UNITED STATES GOVERNMENT

Federal Rules of Civil Procedure Rule 19 provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of his claimed interest

...

(b) Determination by Court Whenever Joinder not Feasible.

If a person . . . cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

MDC claims the application of Rule 19 F.R.Civ.P. because of NORTHROP's allegations that the disclosure of data and technology-particularly by NORTHROP to MDC-created a license limiting MDC's right to use the data and technology in its sales efforts of F-18 design aircraft not "carrier-suitable." In essence MDC urges that to successfully maintain such a claim the Court must necessarily decide that NORTHROP has proprietary rights which derogate both the rights of MDC and

the United States government in whatever data and technology NORTHROP disclosed to MDC. The rights of the United States Government and, derivatively of MDC are claimed to be created pursuant to Armed Services Procurement Regulations (ASPR),² as "law binding on the parties in a Government contract . . ." *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 690 (Ct.Cl.1975).

There is no dispute between the parties that the YF-17 data and technology developed by NORTHROP was in fulfillment of its obligations under a government contract. The ASPRs³ clearly give the United States Government unlimited rights in the YF-17 data and technology. The fluidity⁴ of NORTHROP's argument does not change the fact that NORTHROP's YF-17 contract with the United States Government incorporated the ASPRs applicable to the very rights in data and technology NORTHROP now claims MDC is misappropriating.

Procurement of the design, development and production of weapons systems for the defense of the nation is a governmental function peculiarly left to an amalgam of executive and

² These regulations have recently been redesignated Defense Acquisition Regulations (DAR) and will be used herein interchangeably.

³ See particularly ASPR § 9-202.2(b) (June 1979); § 9-201(b) (July 1976); § 9-201(d) (July 1976); § 7-104.9 (March 1979); § 7.104.9(a) (August 1969); § 7.104.9(a), (b)(2) (April 1972); § 9.202.3(b)(2) (June 1979).

⁴ At one point counsel for NORTHROP advises the Court

a. December 3, 1979 "The Government did not . . . obtain the P-530, P-630 data from NORTHROP."

b. December 3, 1979 "The United States Government has recognized NORTHROP's right in it."

On the other hand NORTHROP asserts

a. "NORTHROP does not allege for the purposes of this action that the Government does not have unlimited rights to use YF-17/F-18A technical data"; NORTHROP's Memorandum of Points and Authorities In Opposition to Motion to Dismiss And for Summary Judgment. p. 94.

legislative powers. In the exercise of those plenary powers the Government—subject only to self-imposed limitations—has the right to designate the who, what, when and where of weapons system production. When that right can be called into question by a Court in what cosmetically⁵ is a dispute between private parties, the United States Government comes within the considerations of indispensability delineated by Rule 19 F.R.Civ.P.

Dismissal does not, however, become automatic because the United States Government's rights in the data and technology surrounding the development of the F-18 is inextricably bound up with the private dispute between NORTHROP and MDC. Dismissal is proper only when a judgment may be prejudicial to the rights of the absent person or those already parties before the Court. Another consideration is whether a judgment can be shaped to provide relief for a complaining party minimizing or eliminating the prejudice. The adequacy of the remedy available without the absent person is a third consideration. A fourth concern of the Court is the availability of an adequate remedy to the complaining party if the action is to be dismissed for nonjoinder.

NORTHROP disclaims the necessity of joinder of the United States Government by assertions that the fashioning of NORTHROP's requested relief is simply not dependent upon determination of the rights of the United States Government. The assertions fall short of the uncontroverted facts. Any injunctive relief against MDC as prayed by NORTHROP nec-

⁵ NORTHROP continually argues that "... NORTHROP has no claim against, and seeks no relief directly or indirectly from, the Government." This argument completely ignores that the consideration of NORTHROP's rights and the impact upon the claimed rights of MDC and the United States Government allegedly created by contracts for development of the F-18.

essarily limits the United States Government in its F-18 procurement activities.⁶

NORTHROP urges as controlling authority the decision in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (D.C. Cal. 1971), aff'd on the District Court's opinion 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). If NORTHROP depends upon Occidental Petroleum the dependence is totally misplaced. Judge Pregerson in deciding the indispensable party issue does no more than apply the general rules governing Rule 19 joinder to the facts of the case. Although helpful in that analysis it does not address the issue here where the interest of the United States Government subsumes the very subject matter of the action i.e., data and technology surrounding the F-18 development contracts. Without determination of United States Government derivative rights and the so-called derivative "flow-down rights"⁷ claimed the MDC no meaningful relief can be given by this Court.

The relief claimed by NORTHROP impinges upon the United States Government defense procurement policies in yet another important respect. The United States Government has plenary power in the conduct of foreign relations. It alone decides who will provide weapons systems, data and technological know-how to foreign governments.* NORTHROP would have this Court order that the only entity that could provide the source of data and technological assistance

⁶ NORTHROP's position is that the United States Government can procure land based F-18's *ONLY* from NORTHROP and carrier based F-18s *ONLY* from MDC.

⁷ DAR § 7-104.9(a) and DAR § 9-202.2. The extent of "flow-down" cannot be determined without interpretation of the United States interests in the contracts for development of the F-18.

* See: Foreign Assistance Act, 22 U.S.C. § 2151 et seq.; International Security Assistance and Arms Export Control Act, 22 U.S.C. § 2751 et seq.; International Traffic in Arms Regulations.

for land-based F-18 aircraft for either FMS⁹ or licensed commercial sales abroad is NORTHROP. Concomitantly MDC is the *ONLY* authorized source for carrier-based F-18 data and technological assistance.

NORTHROP attempts to pigeon-hole each of the aspects of relief urging on the Court that declaratory relief and damages would leave unencumbered the government interests in F-18 data and technology. Without real analysis that simplistic suggestion has much appeal. What it lacks is substance. NORTHROP claims that MDC is breaching their agreement by disclosing to potential foreign buyers F-18 data and technology that NORTHROP provided to MDC. This approach mixes the license and business opportunity theories pressed by NORTHROP.¹⁰ However, no disclosure can be made in connection with the sales activity involving military data or technology without an express approval of an appropriate United States Agency. What is required is the determination of whether an exporter of data or technology acts as an agent of the government because of the pervasive statutes and regulations controlling the exporter. This is particularly critical if, as in the case here, the exporter is a government contractor for the very data or technology being exported. If that question lends itself to resolution in favor of MDC, then it is clear that NORTHROP's exclusive remedy is against the United States pursuant to 22 U.S.C. § 2356(a)(2)(A) or (b). Whatever the outcome of such a consideration, the interest of the United States Government is very much in issue.

The United States Government is both necessary and indispensable to the equitable and just determination of the

⁹ Foreign Military Sales are made directly by the United States to foreign nations pursuant to mutual assistance and foreign policy considerations.

¹⁰ These theories evoke vehement protestations from each side that the F-18 is the result of their singular genius. The dispute need not be resolved to decide these motions.

controversy framed by the allegations of NORTHROP's First Amended Complaint.

2. SUBJECT MATTER JURISDICTION

MDC claims that the application of 22 U.S.C. § 2356, 10 U.S.C. § 2273 and the Tucker Act effectively defeat the subject matter jurisdiction of the Court over the complaints of NORTHROP.

a. 22 U.S.C. § 2356

In its pertinent part 22 U.S.C. § 2356 provides:

(a) Whenever, in connection with the furnishing of assistance under this chapter—

* * *

information, which is (A) protected by law, . . . , is disclosed by the United States Government or any of its officers, employees, or agents in violation of such restrictions,

the exclusive remedy of the owner . . . is to sue the United States Government for reasonable and entire compensation for such practice or disclosure . . .

NORTHROP focuses on disclosure "by the United States Government" as the controlling language of § 2356. NORTHROP then argues that MDC and not the United States Government is disclosing and threatening to disclose F-18 data and technology in its sales efforts abroad. The argument glosses what must be the real concern of this Court.

Section 2356 has alternate iterations fixing liability on the United States Government. This provision is "the exclusive remedy of the owner" when either "the United States Government or any of its officers, employees, or *agents*" (emphasis added) make the disclosure of protected information. The question of the United States Government's clear agency in FMS sales and its, at least putative, agency relationship in the licensing of commercial sales permissible only in the best in-

terest of United States foreign policy can only be clarified in an action brought pursuant to 22 U.S.C. § 2356.

b. 10 U.S.C. § 2273

Subsection (b) of 10 U.S.C. § 2273 provides:

(b) Any person who believes that—

(1) a design developed by him after July 2, 1926, relating to aircraft or an aircraft component, is being used; or

(2) an article embodying a design developed by him after July 2, 1926, relating to aircraft or an aircraft component, is being used or manufactured; by or for the United States without just compensation to him from the United States or any other source may, . . . sue in the Court of Claims to recover reasonable and entire compensation.

Again NORTHROP has alleged claims that come within the reaches of 10 U.S.C. § 2273. There is no question that NORTHROP's suit *against the Government* cannot be pursued in this Court under § 2273(b). MDC's claim of exclusivity apparently derives from the concluding language of § 2273 providing the claimant with "reasonable and entire compensation."

Although § 2273 provides for entire compensation it asks too much to interpret that language as creating an exclusive remedy. Nothing in the legislative history indicates a desire or intent toward exclusivity. Recognizing that treating § 2273 as a parallel avenue of recovery may cause some problems of judicial coordination the logistics are neither novel nor impossible. A party pressing suit alternatively against the government in the Court of Claims under § 2273 and in this Court on theories of misappropriation can recover only once to be made whole. Courts are equipped to deal with such eventualities and are capable, with the help of vigilant parties, to assure that no double recovery may be had by the injured party.

c. The Tucker Act 28 U.S.C. § 1346(a)(2); 28 U.S.C. 1491

For the same reasons that 10 U.S.C. § 2273 does not defeat the jurisdiction of this Court no prolonged discussion of the

contractual relationship between the United States Government and NORTHROP need be undertaken.

3. NON-JUSTICIABLE POLITICAL QUESTIONS AND THE ACT OF STATE DOCTRINE

a. Non-Justiciable Political Question

MDC asserts that NORTHROP's claims require this Court to enter the political question arena in contravention of the prohibition of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

The Supreme Court in *Baker* (supra) made clear the distinction between jurisdiction in a subject-matter sense and justiciability of the subject matter. It says at 198, 82 S.Ct. at 700

... The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Giving the nonjusticiable portion of the distinction the appellation "political question," the Court then proceeds to provide the considerations for determination of nonjusticiability. Alternatively they are:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. Impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
3. Impossibility of a Court's understanding independent resolution without expressing lack of the respect due coordinate branches of government; or

4. An unusual need for unquestioning adherence to a political decision already made; or
5. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Stripped of all of the rhetoric by both parties in pursuit of their independent interests what NORTHROP asks this Court to decide is WHO will be the exclusive builder (prime contractor) for the carrier-suitable or land-based versions of the F-18 weapons system. NORTHROP would in effect make this Court the super-procurer and sales licensor of a military weapons system. Considerations of the separation of powers and of the complex statutory structure relegating to the Executive Branch of the United States the concerns for the military arsenal—its development, procurement and deployment—bring this case within the political question considerations delineated in *Baker v. Carr* (supra).

b. Act Of State Doctrine

The reticence of United States Courts to intervene in private actions when an act of state¹¹ is involved finds its fountain-head in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897) when the Supreme Court expressed the doctrine in this manner.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

The judicial policy considerations of *Underhill* were reaffirmed with an exhaustive review of the intervening authorities in *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). In *Sabbatino* the Supreme Court expressed the constitutional underpinnings of the Act of

¹¹ An "act of state" is an executive or administrative exercise of foreign power by an independent State.

State Doctrine and explained its reasoning as arising out of the constitutional separation of powers giving the Executive Branch of government the obligation to protect the interest of United States citizens in their relationship with foreign governments.

MDC urges the Act of State Doctrine be applied to the claims of NORTHROP particularly because both NORTHROP and MDC would be compelled to inquire into the actions of the governments of Australia, Canada, Germany, Greece, Israel, Korea, Spain, Turkey, and the United Kingdom in establishing that the alleged acts charged against MDC are causally connected to the failure of NORTHROP to accomplish F-18 sales in these countries.

If MDC is correct in its assertion—and antitrust precedent supports MDC¹²—this Court would be required to inquire into sensitive questions of vital concern of the military security of those foreign governments in which NORTHROP claims MDC's acts thwarted its sales efforts. *Underhill* and *Sabbatino* compel dismissal. The Ninth Circuit views of the Act of State Doctrine in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (D.C. Cal. 1971), and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) are not in conflict with such a decision. The Sherman Act discussion to follow should make clear that even if *Timberlane* cannot be factually distinguished¹³ the antitrust concerns are probably non-existent as an offsetting concern.

¹² See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); *Salerno v. American League of Professional Baseball Clubs*, 429 F.2d 1003 (2d Cir. 1970), cert. denied 400 U.S. 1001 (1971), both cases construing pleading of the "by reason of" provision of the Sherman Act.

¹³ *Timberlane* (supra) involved a judicial determination of a mortgage dispute. Here we are concerned with one of the most vital concerns of a sovereign—its military arsenal and the decision affecting it.

4. ILLEGAL RESTRAINT OF TRADE-SHERMAN ACT SECTION 1

MDC has moved for summary judgment on NORTHROP's First, Second, Third, Sixth and Seventh causes of action because it asserts that the agreements upon which these causes of action depend constitute an illegal allocation of markets in violation of the Sherman Act Section 1. MDC claims that this clear division of markets—carrier-suitable F-18s to MDC and land-based F-18s to NORTHROP—comes within per se declarations of violations of the Supreme Court in antitrust cases.

NORTHROP urges that the agreement is not in restraint of trade but rather enhances competition. NORTHROP further urges that the restraints imposed by the Basic Agreement are subject to a rule of reason analysis that can be made only after a full trial of the case. The rule of reason argument is pressed because of NORTHROP's claim of uniqueness of the industry concept embodied in the MDC-NORTHROP relationship and its alleged horizontal-vertical aspects.

On both scores NORTHROP is wrong. There is no vertical relationship alleged, shown, or that can be shown between MDC and NORTHROP to invoke the reasoning of *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). NORTHROP and MDC are horizontal competitors competing in the market place for weapons systems sales. The agreements themselves are eloquent evidence of the absence of any vertical aspect of the relationship. The Teaming Agreement is simply that—a joint effort to obtain a design contract in the U.S. Navy NACF competition. The Basic Agreement specifically eschews a joint venture or other relationship creating joint and several liability.

NORTHROP's enhancement of competition theory, because somehow or other "carrier-suitable F-18A and NORTHROP's land-based F-18L have been keen, head to head competitors in every international competition" is totally untenable. The testimony concerning competition is belied by two irrefutable

facts—1. A land-based F-18 design cannot be sold by NORTHROP to the U.S. Navy—or for that matter to any navy in the world.¹⁴ 2. NORTHROP's own position in this litigation is that MDC is offering the land-based design in violation of the Basic Agreement.

NORTHROP's "unique industry context" theory suffers an even greater defect that is not cured by the affidavit of Dr. Almarin Phillips. The activity that is at issue here is the *sale* of F-18 aircraft. The sophistication of the technology and the complexity of the requirements for production do not change the simple principles of marketing products taught in basic marketing courses or learned by the experience of selling any product subject to the scrutiny of a discerning buyer.

As appealing as the rule of reason argument of NORTHROP is to this Court, the undisputed facts of this case and the simple interpretation of the language of the Basic Agreement bring this case clearly within the *per se* illegality defined by the Supreme Court in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

One more contention of NORTHROP must be disposed of before we leave the restraint of trade aspect of this litigation. NORTHROP claims validity of the market division provided in the Basic Agreement as an ancillary restraint attached to the licensing of some undefined and amorphous YF-17 data and technology. NORTHROP's aim misses the mark. There is no data or technology licensed to MDC. MDC does not derive its right to build an F-18 weapons system (carrier-based) from any license agreement with NORTHROP. The Teaming Agreement was one required by the United States Government and NORTHROP was paid for any manner of its participation or disclosures in that joint effort. MDC obtained its abilities to build and sell F-18 weapons system from its participation in the

¹⁴ It takes little expertise to recognize that a land-based design F-18 simply cannot be used for aircraft carrier launch and landing procedures without making it a carrier-suitable aircraft.

NACF competition with the proprietary rights that neither reserved but did obtain as the result of that participation. Ancillary restraints under these circumstances are not tolerated in such transactions particularly when they take on the per se characteristics of division of market.

5. ATTEMPT TO MONOPOLIZE-SHERMAN ACT SECTION 2

The Sherman Act Section 2, 15 U.S.C. § 2 (Supp. 1980), provides:

Every person who shall . . . attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

In *American Tobacco Company v. United States*, 328 U.S. 781, 785, 66 S.Ct. 1125, 1127, 90 L.Ed. 1575 (1946) the United States Supreme Court first approved the definition of attempt to monopolize as follows:

The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed . . . for the purpose of such accomplishment.

Monopolization in that context was given a meaning limited to the power to exclude competitors or to fix prices in a relevant market.

NORTHROP's allegations and arguments in support of its attempt to monopolize claim are again somewhat vague. It claims in essence only that the issue requires trial. This Court is aware of the admonition of *Pollerv. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). To read Poller as a prohibition to summary judgment in antitrust cases overreaches the language that it should be "used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged

conspirators, and hostile witnesses thicken the plot." Poller at 473, 82 S.Ct. at 491. When material facts are not in dispute and only questions of law remain to be resolved, trial courts should not be reluctant to make prompt disposition of matters without penalizing the parties with long and expensive pre-trial practices that would lead to the same result.

Attempt to monopolize cases are peculiar because they, even more than merger cases, deal in probabilities of success in the market delineated by the product and the geographic marketing capabilities of the producers.

The peculiarity is exacerbated by the very purpose of competition. Competition to be effective requires that the participants "attempt" to sell all of the product they can produce to the exclusion of competitors in the same product and geographic market. The antitrust laws were enacted not to protect competitors but rather to assure free and aggressive competition in the market place of "trade or commerce among the several States, or with foreign nations." NORTHROP's arguments are all competitor-protective oriented. What is disturbing is that traditional considerations of competition and commerce do not adequately answer the concerns of the Court in the analysis of F-18 sales activity.

No one could contest that the product market of concern to the Court is F-18 weapons system. Some argument can be made that submarkets ought to be recognized in F-18 aircraft configured for land-based activities and those suitable to seagoing aircraft carrier deployment. Geographically, the world is arguably the market place. Certainly included would be those reaches of the world market encompassing nations with the wealth capacity and the use capability needed for consideration of the use of F-18 weapons systems.

The concern of product and geographic market from the traditional antitrust viewpoint become unimportant here for one very basic reason. The United States Government has the absolute and overriding control of both the production and

sales potential of the product that brings these parties into vitriolic conflict.

What strikes the Court under such circumstances is that there is not the "trade or commerce among the several States, or with foreign nations" essential to antitrust concerns of monopolization including the critical inquiry here—attempt to monopolize. The United States Government *is the market*¹⁵ concerned with production and distribution of weapons systems for governmental military establishments. As such, this differs from the basic thrust of antitrust laws applicable to governmental procurement practices in competition with consumer enterprises buying goods generally available in the marketplace.

The United States Government also makes the world market. No single group of producers has any power to expand a market share beyond that considered by the United States Government in the implementation of domestic defense and foreign policy which is in the best interest of its citizens.

Political considerations aside, the monopoly, if any, enjoyed or threatened by MDC is a governmental creation outside the reaches of the Sherman Act Section 2.

NORTHROP cites *Ovitron Corp. v. General Motors Corp.*, 295 F.Supp. 373 (S.D.N.Y. 1969) (*Ovitron I*) as support for the application of the Sherman Act to governmental procurement activities. *Ovitron I* is distinguishable. The Court there was concerned with a very clear charge of predatory pricing. More importantly *Ovitron I* does not reach the issue presented here i.e., the impact of the government's absolute ability to make the market. NORTHROP in a motion to correct the record has gone outside of the record upon which the Court in *Ovitron*

¹⁵ The Foreign Assistance Act, 22 U.S.C. § 2151 et seq.; International Security Assistance and Arms Export Control Act, 22 U.S.C. § 2751 et seq.; and International Traffic in Arms Regulations comprehensively give the government plenary power in military procurement practices.

made its decision. But even taking all of the facts NORTHROP would now have this court consider in reading the decision in *Ovitron I*¹⁶ the result would not change. *Ovitron Corp. v. General Motors Corp.*, 364 F.Supp. 944 (S.D. N.Y. 1973) (*Ovitron II*) suggests the impossible task NORTHROP would have in proving antitrust damage. To prove such damage NORTHROP would have to show that it would be the successful bidder in the procurements it alleges have been frustrated by MDC's conduct. Aside from the political question and act of state problems already disposed of in this opinion NORTHROP still faces the task of showing that the United States Government would turn to it for its F-18 needs. The only way this Court can conceive that it could be done would be to show an *absolute* need of F-18 weapons systems by the United States and its chosen allies in military procurement. Added to the *absolute* need would be this Court's award of NORTHROP's prayed for relief giving it the *exclusive* right to bid the F-18 weapons systems apportioned to it by the Basic Agreement. In light of the disposition made of the restraint of trade issue herein that cannot come to pass.

CONCLUSION

1. MDC's motion to dismiss the complaint because of the failure to include an indispensable party is granted.
2. MDC's motion to dismiss the complaint for lack of subject matter jurisdiction [22 U.S.C. § 2356] is granted.
3. MDC's motion to dismiss the complaint for lack of subject matter jurisdiction [10 U.S.C. § 2273 and The Tucker Act 28 U.S.C. § 1346(a)(2) and § 1491] is denied.

¹⁶ The additional fact NORTHROP asks this Court to consider is that the radios which was the product involved were on the Munitions List. The assumption of that fact would not change the reasoning herein.

4. MDC's motion to dismiss the complaint for failure to state a claim (nonjusticiability and Act of State Doctrine) is granted.
5. MDC's motion for summary judgment on the First, Second, Third, Sixth and Seventh causes of action (illegal restraint of trade-Sherman Act Sec. 1) is granted.
6. MDC's motion for summary judgment on the Sixth cause of action (attempt to monopolize Sherman Act Section 2) is granted.

**ORDER OF DISTRICT COURT DISMISSING COMPLAINT
AND GRANTING SUMMARY JUDGMENT**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL NO. 79-04145-R

NORTHROP CORPORATION,

Plaintiff,

v.

MCDONNELL DOUGLAS CORPORATION,

Defendant.

**ORDER DISMISSING COMPLAINT AND GRANTING
SUMMARY JUDGMENT**

The Court, having considered the motion of defendant McDonnell Douglas Corporation to dismiss this action pursuant to Rules 12(b)(1), 12(b)(6), 12(b)(7), 12(h)(2) and 19, Federal Rules of Civil Procedure, and, in the alternative, for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, the arguments and Memoranda of Points and Authorities presented by counsel, and having rendered an opinion filed on September 5, 1980, and good cause appearing, enters the following Order and Judgment in accordance with the Findings of Fact and Conclusions of Law filed herewith,

IT IS HEREBY ORDERED AND ADJUDGED.

1. Defendant's motion to dismiss plaintiff's First Amended Complaint (hereafter "the Complaint") for failure to join an indispensable party is granted.

2. Defendant's motion to dismiss the Complaint for lack of subject matter jurisdiction, on the ground that the remedy provided by 22 U.S.C. § 2356 is exclusive, is granted.

3. Defendant's motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, or in the

alternative for summary judgment, on the bases of the political question doctrine and Act of State doctrine, is granted.

4. Defendant's motion to dismiss the Complaint for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment, on the grounds that to grant the injunctive, declaratory or damages relief sought by plaintiff in the Complaint would require the Court to construe and enforce the agreements of the parties in a manner which would constitute a *per se* violation of Section 1 of the Sherman Act, is granted.

5. Defendant's motion to dismiss the Cartwright Act claim [California Business and Professions Code § 16,700 *et seq.*] included in the Seventh Count of the Complaint for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment, on the ground that no combination is alleged between defendant and any other person, is granted.

6. Defendant's motion to dismiss the plaintiff's claims for damages under its Fourth, Fifth, Sixth, Seventh and Eighth Counts of the Complaint for failure to state claims upon which relief can be granted, or in the alternative for summary judgment, on the grounds that plaintiff has not suffered and cannot show any injury in fact as a result of defendant's alleged acts, is granted.

7. Defendant's motion to dismiss the Sixth Count of the Complaint (Section 2, Sherman Act) for failure to state a claim upon which relief can be granted, or in the alternative for summary judgment, is granted.

8. Defendant's motion to dismiss the Complaint for lack of subject matter jurisdiction on the grounds that the remedies provided by 10 U.S.C. § 2273 and the Tucker Act, 28 U.S.C. § 1346(a)(2) and § 1491, are exclusive is denied.

9. Plaintiff's claims arising out of the allocations of work to NORTHROP pursuant to the Basic Agreement are moot and not ripe for determination in light of MDC's stipulation of November 28, 1979. No decision need be reached by this Court on what now is in the posture of an advisory opinion.

10. Plaintiff's Complaint is hereby dismissed, with prejudice, and at Plaintiff's costs.

Dated Dec 1, 1980.

/s/ Manuel Real

UNITED STATES DISTRICT JUDGE

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN
SUPPORT OF ORDER DISMISSING COMPLAINT AND
GRANTING SUMMARY JUDGMENT**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 79-04145-R

NORTHROP CORPORATION,

Plaintiff,

v.

McDONNELL DOUGLAS CORPORATION,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[These Findings of Fact and Conclusions of Law are respectfully submitted by McDonnell Douglas Corporation pursuant to the Court's instructions.]

The Court, having read and considered defendant's Notice of Motions and Motion to Dismiss and Motion for Summary Judgment and the pleadings, affidavits, declarations, depositions, answers to interrogatories, documents and exhibits on file herein, the memoranda of points and authorities submitted by the parties previously and in support of and in opposition to defendant's Motions to Dismiss and for Summary Judgment, having heard and considered oral argument of counsel, and having rendered an opinion filed on September 5, 1980, and good cause appearing therefor, now makes the following Findings of Fact and Conclusions of Law. Any Finding of Fact which is also a Conclusion of Law is to be treated as both, as is any Conclusion of Law which is also a Finding of Fact.

FINDINGS OF FACT

1. McDonnell Douglas Corporation ("McDonnell") is a corporation incorporated under the laws of the State of Maryland, having its principal place of business in St. Louis County,

Missouri. McDonnell is engaged, *inter alia*, in the design, development and production of military aircraft.

2. Northrop Corporation ("Northrop") is a corporation incorporated under the laws of the State of California, having its principal place of business in Los Angeles County, California. Northrop is engaged, *inter alia*, in the design, development and production of military aircraft.

3. Northrop resides and is doing business in the Central District of California. McDonnell is doing business in the Central District of California.

4. This action is between citizens of different States. The amount in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs.

5. Northrop initiated this action, which involves the F-18 supersonic fighter aircraft, with a three-count complaint filed on October 26, 1979. Northrop alleged that under a Basic Agreement with McDonnell, dated June 27, 1975, it "licensed" McDonnell to use Northrop's proprietary data and technology in connection with the development, manufacture and sale of the F-18 aircraft. In Counts I and II, Northrop alleged that McDonnell was misusing Northrop's property and was abusing the "license" created under the Basic Agreement in connection with offers by McDonnell to sell F-18 aircraft to the Governments of Canada and Israel. Northrop sought preliminary and permanent injunctions to enjoin McDonnell from misusing or otherwise abusing the alleged license in connection with these proposed sales. In Count III, Northrop sought a declaration of the rights of the parties under the Basic Agreement.

6. A hearing was held on Northrop's request for a preliminary injunction on December 3, 1979, and the Court denied Northrop's request.

7. On December 12, 1979, Northrop filed a First Amended Complaint which added five counts to the original three-count complaint. Northrop bases each of those eight counts on the underlying allegation that McDonnell has misused Northrop's proprietary data, technology, and know-how and abused the "license" allegedly created under the Basic

Agreement. Each count incorporates by express reference all of the allegations of the preceding counts, including this underlying allegation. Northrop alleges that, pursuant to the Basic Agreement and a supplemental Agreement dated August 26, 1976: (1) Northrop has the exclusive right to sell F-18 aircraft, regardless of configuration, to the United States Government for use by its Air Force; (2) Northrop has the exclusive right to sell all "land-based" F-18 aircraft, as well as all F-18 aircraft which are not "carrier-suitable" and do not conform to the configuration and structure of F-18 aircraft being purchased by the Navy for its own use, to any customer, foreign or domestic; (3) McDonnell is restricted to selling only carrier-suitable F-18 aircraft to the Navy for the Navy's own use, and with respect to sales to foreign customers, whether directly or indirectly through the U.S. Government, McDonnell is restricted to selling only F-18 aircraft which are both carrier-suitable and conform to the configuration and structure of F-18 aircraft being purchased by the Navy for its own use; and (4) with respect to each prime production contract obtained by McDonnell for F-18 aircraft, Northrop has the unqualified right, except for the Navy's direction to the contrary, to perform or have performed by others all of the work described in an attachment to the Basic Agreement, which was intended to equal approximately 40% of the cumulative direct labor hours required to manufacture F-18 aircraft. Northrop requests declaratory and injunctive relief and damages resulting from McDonnell's alleged: (1) violation of the Basic Agreement and the August 26, 1976 Agreement; (2) misappropriation of Northrop's property; (3) fraud in the inducement of the Basic Agreement, the August 26, 1976 Agreement, and a previous Teaming Agreement executed on October 2, 1974; (4) attempt to monopolize the F-18 fighter aircraft market; and (5) unfair competition. In addition, Northrop seeks a declaration of the respective rights of the parties under the Basic Agreement; an accounting of the profits earned by McDonnell by reason of its alleged fraudulent acquisition of Northrop's proprietary data, technology and know-how and its alleged breach of trust; and recovery in *quantum meruit* for materials

and services provided to McDonnell under the agreements for which Northrop alleges it has not been compensated.

8. McDonnell has moved that Northrop's First Amended Complaint be dismissed for want of an indispensable party (Rules 12(b)(7), 12(h)(2) and 19, Fed. R. Civ. P.), lack of jurisdiction over the subject matter (Rule 12(b)(1), Fed. R. Civ. P.), failure to state a claim upon which relief can be granted (Rules 12(b)(6) and 12(h)(2), Fed. R. Civ. P.), and alternatively for summary judgment (Rule 56, Fed. R. Civ. P.).

9. Northrop has taken the position "that virtually the same operative facts underlie each of Northrop's causes of action."

10. Northrop, beginning in 1965 initiated an effort to develop a new generation of multi-purpose lightweight fighter aircraft. This effort resulted in the development of what Northrop calls its P-530 and P-630 aircraft designs or concepts. The P-530 and P-630 aircraft concepts were basically paper designs which were not converted into flyable aircraft, except to the extent that any of their designs and technology may have been incorporated into the designs of the later YF-17 and F-18 aircraft which were contracted and paid for by the United States Government.

11. In early 1971, the United States Air Force was evaluating the concept of preliminary prototyping of fighter aircraft as a means of reducing defense costs and development risks by building and testing demonstration prototypes before full scale development and large scale production of aircraft.

12. In April 1972, Northrop and General Dynamics were selected by the Air Force for its lightweight fighter ("LWF") technology prototype demonstration program. Northrop was awarded prime contract F33657-72-C-0706 ("the YF-17 contract") by the Air Force in an amount exceeding \$39 million to develop a lightweight fighter technology demonstration prototype denominated the YF-17. During the same time period,

General Dynamics was awarded a contract by the Air Force to develop a lightweight fighter technology demonstration prototype denominated the YF-16.

13. The purpose of the Government's contracts with Northrop and General Dynamics was to develop and demonstrate lightweight fighter technology through prototype aircraft. Under the YF-17 contract, Northrop was required to, among other things, design, develop and fabricate two lightweight fighter prototype aircraft substantially in accordance with Northrop's technical, management and cost proposals incorporated in the YF-17 contract.

14. Northrop now alleges that the design of the YF-17 was virtually identical to that reflected in its P-530 and P-630 designs and that the designs, data and technology developed during its P-530 and P-630 design efforts were infused and incorporated into the YF-17 and, in turn, the F-18.

15. The YF-17 contract by its terms provided that the Government purchased and obtained the prototype aircraft and the data submitted by Northrop pursuant to the Contractor's Data Requirement List (CDRL). The YF-17 contract also incorporated the standard Armed Services Procurement Regulations (ASPR) clauses, § 7-104.9(a) and (b) (August 1969), which granted to the Government unlimited rights in technical data required under the contract. In addition, the YF-17 contract provided that, notwithstanding limited and possibly incomplete Government funding, title to equipment, supplies and materials purchased or fabricated under the contract would pass to the Government. Under the YF-17 contract, the United States Government purchased and received both data and actual prototype hardware, with Northrop's P-530 and P-630 design, concepts and technology incorporated therein. The YF-17 contract contained no qualifications on the Government's rights to use the designs, data and technology incorporated in the YF-17, which, along with the actual prototype aircraft themselves, were the very subject matter purchased by the Government under the contract. The two prototype aircraft were required to be delivered to the Govern-

ment, and, even today when Northrop desires to use one of the YF-17 prototype aircraft (which it now calls its F-18L prototype), it is required to lease the aircraft from the Government.

16. In July 1974, Northrop entered into prime contract F33657-74-C-0754 ("the F-17 proposal contract") with the United States Air Force under which it was paid for defining and proposing to the Air Force a design and program for a production version of the YF-17 prototype, denominated the F-17. General Dynamics was also awarded a contract in competition with Northrop to propose a production version of its YF-16 prototype, denominated the F-16. The production aircraft proposed by Northrop and General Dynamics competed for what the Air Force denominated as its air combat fighter or ACF program. The F-17 proposal contract between the Air Force and Northrop contained standard ASPR clauses, § 7-104.9(a) (April 1972); § 7-104.9(h) (April 1973); § 7-104.9(k) (Nov. 1971); § 7-104.9(l) (April 1972); § 7-104.9(m) (April 1972); and § 7-104.9(n)(1) (April 1972), which granted the Government unlimited rights in technical data required under the contract. Northrop alleges that the configurations and designs it proposed under this contract retained the basic configuration, design, and internal structural arrangement of the YF-17 prototype demonstrator which, in turn, had incorporated the design and technologies of its P-530 and P-630 efforts.

17. While the Air Force proceeded with its LWF and ACF programs, the United States Navy pursued its interest in developing a new fighter/attack aircraft for its carrier fleet. In June 1974, the Navy issued to the aerospace industry a presolicitation notice which contained mission and performance requirements for this proposed aircraft. The Navy designated the contemplated program as the Navy fighter/attack experimental aircraft or VFAX. McDonnell, Northrop and others submitted proposals in response to the Navy's presolicitation notice.

18. In September 1974, a conference committee of the House and Senate, in reaching a compromise on the 1975 Department of Defense Appropriations Act, agreed to finance the Navy's proposed development effort for an experimental fighter/attack aircraft ("VFAX"), but only on the condition that the Navy make maximum use of the lightweight fighter and air combat fighter technology and hardware already owned by the United States Air Force in the course of its ongoing competition for a new fighter aircraft. The conference committee directed that the Navy program be redesignated as the Naval Air Combat Fighter or NACF program. The purpose of the committee's direction to make maximum use of the technology and hardware acquired by the Government in connection with the LWF and ACF programs was to minimize the cost of the Navy program to the Government and the taxpayer.

19. Neither the YF-17 nor the YF-16 prototype was designed for or met the Navy's stringent VFAX requirements. Moreover, the Department of Defense (DOD) and Navy recognized that neither Northrop nor General Dynamics had the desired Navy program experience to develop an aircraft which would satisfy the Navy's VFAX requirements. Accordingly, in connection with the Navy's contemplated NACF procurement, the DOD asked both General Dynamics and Northrop to develop teaming arrangements in accordance with Armed Services Procurement Regulation § 4-117 with companies having experience in building aircraft for the Navy. McDonnell had extensive experience in building Naval aircraft, such as its F-4 Phantom aircraft.

20. As a result of the Congressional conference committee's direction to make maximum use of the lightweight fighter and air combat fighter program technology and hardware and the DOD's request that Northrop team with a company capable of designing and building carrier-suitable aircraft, Northrop and McDonnell needed each other if they were to compete effectively for the NACF contract.

21. On October 2, 1974, McDonnell and Northrop entered into a two-page Teaming Agreement "to team for the purpose of developing, proposing and producing a USAF derivative of the YF-17 (USAF ACF) and a carrier-suitable version of the YF-17 (USN ACF) to satisfy U.S. Navy VFAX requirements." Under the Agreement, McDonnell would be prime contactor on the NACF and Northrop would be associate contractor. Northrop would be prime contractor on the USAF ACF and for foreign variants thereof. There were no provisions in the Teaming Agreement restricting in any way either party's use of data, technology or know-how transferred from one to the other thereunder, nor did the Teaming Agreement restrict either party's right to market the aircraft developed by each pursuant to the Agreement. The Agreement by its own terms was to terminate on June 30, 1975, unless mutually extended. The Teaming Agreement was not extended.

22. On October 12, 1974, the Air Force issued on behalf of the Navy a Request for Proposal (RFP) for the design, development, manufacture, test and evaluation of a Navy aircraft meeting the NACF requirements. Because of the funding contingency imposed by Congress, this solicitation was limited to Northrop and to General Dynamics and in pertinent part stated:

"The Navy is initiating a program for the development and production of a new carrier-based fighter/attack aircraft weapon system to be a derivative of the Air Force Lightweight Fighter program. In the House of Representatives Report No. 93-1363 of 18 September 1974, it was directed that the development of this aircraft make maximum use of the Air Force Lightweight Fighter (USAF LWF) and Air Combat Fighter (ACF) technology and hardware."

23. Pursuant to the Teaming Agreement, Northrop continued to concentrate on winning the Air Force competition for the ACF and McDonnell concentrated on winning the Navy competition for the NACF. The first NACF proposal was submitted by McDonnell on December 1, 1974. Supplemental and updated proposals were submitted by McDonnell to the Navy between January and May 1975.

24. On January 13, 1975, the Air Force announced that the General Dynamics F-16 design had won the ACF competition and that the Northrop YF-17 design had lost. The Navy NACF competition continued thereafter, until on May 2, 1975, the Navy announced that McDonnell was the winner of that competition and designated the McDonnell/Northrop proposed NACF aircraft as the F-18. Northrop alleges it transferred its P-530, P-630, YF-17 and F-17 data, technology and know-how to McDonnell during the proposal period of October 1974 to May 1975 during which the October 2, 1974 Teaming Agreement was in effect.

25. The Northrop F-17 ACF proposals and the McDonnell NACF proposals (prepared and submitted as contemplated by the Teaming Agreement) were contracted and paid for by the United States Government under the Northrop F-17 proposal contract of July 1974 as modified by PO0003. This modification provided a payment of \$4,500,000 by the Government for "performing the initial design definition studies and analyses necessary to prepare and submit a full-scale development proposal and revisions thereto as required by the Government for the Navy Air Combat Fighter derivative of the Air Force Combat Fighter." In addition to the standard ASPR clauses in the F-17 proposal contract, this modification also incorporated updated clauses, § 7-104.9(a), (h) and (m) (Nov. 1974) and an additional clause, § 7-104.9(p) (April 1974), granting the Government unlimited rights in data required under the contract.

26. The Navy NACF competition was a business opportunity created not by Northrop but rather by the United States Government as a result of the Congressional directive to the DOD that the Navy, in connection with the NACF program, make maximum use of the Air Force's lightweight fighter and air combat fighter technology and hardware and the DOD's subsequent request that Northrop and General Dynamics enter into teaming arrangements with contractors having capability and experience in building Navy aircraft.

27. The Teaming Agreement was not a license by Northrop to McDonnell of proprietary data, technology and know-how. It constituted a teaming arrangement pursuant to ASPR § 4-117 entered into for the purpose of utilizing the capabilities of both companies in proposing fighter aircraft to the Government. Both Northrop and McDonnell were paid millions of dollars by the Government for their respective participation and disclosures to one another and to the Government in their joint undertakings under the Agreement.

28. After the Navy announced that McDonnell had won the NACF competition, it awarded McDonnell prime contract N00019-75-C-0448 dated May 2, 1975 to sustain the engineering effort on the F-18 program for the period from May 1, 1975 to August 31, 1975. This contract also contained standard ASPR clauses, § 7-104.9(a) (Nov. 1974); § 7-104.9(d) (Nov. 1974); § 7-104.9(h) (Nov. 1974); § 7-104.9(k) (Nov. 1971); § 7-104.9(l) (March 1975); § 7-104.9(m) (Nov. 1974); and § 7-104.9(p) (March 1975), granting the Government unlimited rights in technical data required under the contract. McDonnell, in turn, awarded Northrop an advanced engineering contract, Purchase Order S50116, under which Northrop was paid for its F-18 efforts during the period from May 1975 through August 1975. This contract incorporated by reference standard ASPR clauses, § 7-104.9(a) (Nov. 1974); § 7-104(c) (Nov. 1974); § 7-104.9(m) (Nov. 1974) and § 7-104.9(p) (March 1975), granting the Government unlimited rights in technical data.

29. On June 27, 1975, Northrop and McDonnell entered into what they have called the "Basic Agreement." The Agreement provided in part:

"3. Contract Responsibilities

(a) The parties hereby agree that MDC will be prime contractor in connection with contracts with the U.S. Navy for the development of the F-18 and for the production of those F-18 aircraft purchased by the U.S. Navy for its own use. Furthermore, in the event a foreign customer desires to procure from MDC (either directly, or indirectly through the U.S. Navy) F-18 aircraft of basical-

ly the same configuration as those purchased by the U.S. Navy for the latter's present or future use (for example, configuration and equipment changes to achieve a reconnaissance capability for a potential customer would still be considered 'basically the same' configuration), MDC will be prime contractor in connection with contracts for any such sale. NOC will participate in the performance of all such contracts performed by MDC as prime contractor to the extent set forth in paragraph 5 hereof.

(b) NOC may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the NOC YF-17 other than those referred to in paragraph (a) above."

30. In connection with the contracts contemplated in paragraph 3 of the Basic Agreement, the parties also agreed to share design, test, and test analysis data, to allocate the work obtained and to keep each other fully informed of their F-17/F-18 family marketing activities. By its terms the Basic Agreement superseded the prior Teaming Agreement. The parties made clear that the relationship created was not "in any manner intending to create a joint venture or otherwise incur or imply joint or several liability."

31. Northrop alleges that under the Basic Agreement the parties agreed that McDonnell would have the market for F-18 aircraft designed and built for carrier-based operations and that Northrop would have the market for all F-18 aircraft designed and built for land-based operations. The Basic Agreement was intended by the parties to divide or allocate the market for F-18's between themselves, with McDonnell taking the Navy and other potential customers requiring an aircraft fully capable of carrier operations, and Northrop taking the Air Force and other potential customers desiring a plane designed for land-based operation. Northrop seeks injunctive, declaratory and damage relief which would have the effect of enforcing this interpretation.

32. Northrop contends that under the Basic Agreement, Northrop alone is entitled to offer, sell or provide data and

technological assistance in connection with the foreign marketing or manufacture of land-based F-18 aircraft that are not carrier-suitable and do not conform to the configuration and structure of F-18 aircraft being purchased by the Navy for its own use.

35. The Basic Agreement was not a license by Northrop to McDonnell of Northrop proprietary data, technology and

know-how. McDonnell did not derive its right or ability to build the F-18 weapons system from the Basic Agreement.

36. Subsequent to the execution of the Basic Agreement, further design activities by Northrop and McDonnell for the F-18 program ensued and, in January 1976, the Navy awarded McDonnell full scale development prime contract N00019-75-C-0424 (the "FSD prime contract") for the design, development, delivery, manufacture and test of eleven full scale development F-18 aircraft and associated management, data, and logistics. The FSD prime contract price exceeded one billion dollars. Among other things, the FSD prime contract established that the allowable costs of the contract would include all costs incurred by the contractor in anticipation of the award of the contract. The contract also incorporated standard ASPR data clauses, § 7-104.9(a) (Nov. 1974); § 7-104.9(h) (Nov. 1974); § 7-104.9(k) (Nov. 1971); § 7-104.9(l) (April 1972); § 7-104.9(m) (Nov. 1974); § 7-104.9(n)(l) (April 1972); and § 7-104.9(p) (April 1974), providing the Government with unlimited rights in all technical data required under the contract.

37. McDonnell in turn, in April 1976, awarded Northrop a subcontract, Purchase Order S60039 (the "FSD subcontract"), under which Northrop agreed to provide "personnel, material, services, facilities, logistics support, data and management required to design and develop, fabricate, qualify, test, document and deliver [certain] . . . F-18 major assembly/equipment in accordance with MCAIR Statement of Work (SOW) No. WS-F-18-927."

38. The clause in the FSD prime contract allowing recovery of all costs incurred by the contractor in anticipation of the award of the contract was incorporated in the Northrop subcontract and Northrop was paid thereunder for its work performed during the period from September 1, 1975 to the contract date. In addition, the standard ASPR clauses, § 7-104.9(a) (Nov. 1974) and § 7-104.9(p) (April 1974), granting the Government unlimited rights in all technical data required under the contract were incorporated by mutual agreement in the Northrop subcontract.

39. The FSD subcontract required Northrop to provide McDonnell with "data required to design, develop, fabricate, qualify, test, document and deliver" the F-18 equipment to be furnished McDonnell under the subcontract. It further provided that "all drawing originals developed during this procurement shall be the sole property of McAIR [the McDonnell Aircraft Company, a division of McDonnell]." As defined in the subcontract, "drawings" encompassed virtually all technical data prepared or required under the subcontract. This subcontract provision giving McDonnell sole ownership of all original "drawings," including those prepared by Northrop, takes precedence over any provision of the Basic Agreement, since paragraph 20 of the subcontract's General Conditions specifically provides:

"The MOU [Basic Agreement] remains in full force and effect in accordance with its terms; nevertheless, the parties agree that no provision of the MOU shall prevent or alter the exercise of rights or the performance of the obligations expressly set forth in this FSD subcontract."

40. Both the FSD prime contract and the FSD subcontract incorporated by reference Addendum No. 438 to MIL-D-8706(B) which provided that YF-17 engineering and test data as applicable to the F-18 aircraft could be submitted in satisfaction of certain of the engineering data and test requirements.

41. The infusion of in excess of a billion dollars of Government funds into the full scale development of the F-18 gave Northrop renewed vigor in connection with its F-17 marketing efforts. In late 1975 and early 1976, Northrop began an effort to interest the Shah of Iran in becoming the first customer for a land-based F-17. In light of the Navy award, this land-based day fighter aircraft design was designated as the F-18L.

42. The Navy was concerned that Northrop's Iranian efforts might adversely affect the Navy's F-18 development program and required both Northrop and McDonnell to provide assurances that their respective foreign sales efforts would not in any way interfere with the Navy's F-18 program.

Northrop and McDonnell were directed to submit for approval by the Navy and the DOD a foreign military sales master plan ("FMS Master Plan") jointly developed by Northrop, McDonnell and General Electric (the F-18's engine developer and manufacturer under a separate Navy prime contract), concerning foreign sales of the Navy F/A-18A and Northrop's F-18L, that would assure the Navy that foreign sales would not adversely affect the development and production of the Navy's F/A-18A aircraft. This prompted new agreements between McDonnell and Northrop executed on August 26 and 28, 1976.

43. The August 26, 1976 Agreement reaffirmed the Basic Agreement and provided that Northrop "has elected to design, develop and produce for sale to the United States and to foreign governments all aircraft designed only for land-based operations which are derived from the YF-17." Paragraphs A, B, and C of the Agreement provided:

"A. On 27 June 1975 MDC and NOC entered into an agreement (hereinafter referred to as the 'Basic Agreement') governing their business relationship relative to programs involving derivatives of NOC's YF-17 aircraft.

B. Pursuant to Paragraph 3(b) of the Basic Agreement, NOC has elected to design, develop and produce for sale to the United States and to foreign governments all aircraft designed only for land-based operations which are derived from the YF-17, which aircraft may incorporate such features and equipment designed, developed and/or produced under or in connection with MDC's prime contract with the U.S. Navy for the F-18 family of aircraft as NOC deems appropriate. Such aircraft are hereinafter referred to as the 'LBF-18'. The currently defined configurations of the LBF-18 are described in Northrop Document NB 75-301R, Weapon System Description, dated July 1976.

C. The foregoing election by NOC is not in derogation of MDC's rights under the Basic Agreement and in particular MDC's rights shall remain as set forth in Paragraph 3(a) of the Basic Agreement."

44. On August 28, 1976, the parties executed a number of supplemental and additional agreements, which in addition to

the August 26, 1976 Agreement are described in a Memorandum of Agreement dated August 28, 1976, as follows:

"The documents which now constitute our full agreement on the matters we have had under discussion for the last several weeks are:

1. The 26 August 1976 Agreement as amended on 28 August 1976.
2. Supplemental Agreement dated 28 August 1976.
3. Letter dated 28 August 1976 to Vice Admiral Kent L. Lee.
4. Amendment dated 28 August 1976 to Basic Agreement of 27 June 1975.
5. Master Plan Agreement dated 28 August 1976.
6. Deletion of last two sentences of paragraph 1.1 of F-18 Master Plan, MDC A4275 dated August 1976 [the plan for McDonnell's foreign sales], so that the last sentence of paragraph 1.1 shall read as follows:

However, it is likely that either in the interest of economy or in the interest of special requirements that some changes will be required for specific FMS countries as long as the FMS aircraft will remain basically the same configuration as the USN F-18.

7. Memorandum of Agreement dated 28 August 1976.
- *Both parties agree that the Master Plan shall not modify contractual arrangements between the parties." All of the above agreements generally related to the allocation of sales and division of work on F-18 aircraft.

45. On July 1, 1976, in the midst of Northrop's attempts to sell an F-18L to Iran, President Ford signed the International Security Assistance and Arms Export Control Act of 1976 (the "ISAAEC Act"), popularly known as the Humphrey-Morgan Act. The ISAAEC Act imposed additional limitations on Northrop and all other manufacturers of military equipment in connection with their foreign sales activity.

46. Early in 1977, during the first months of the Carter Presidency, the Administration initiated a review of United

States arms export policy and suspended all pending foreign arms sales activity pending its completion. Confirming this Presidential action, Northrop received a letter dated May 18, 1977 from James McIntyre, Deputy Director of the Office of Management and Budget, advising Northrop that the Administration had included Northrop's F-18L program in its suspension of all foreign arms sales, including related promotional activities, until a review of foreign military sales policy had been completed and the President had established new policy guidelines. Mr. McIntyre cautioned Northrop that, while new policy guidelines would soon be forthcoming, it might still be some time before a final decision could be made on whether to authorize the development of a land-based version of the F-18 for export since "the program raises complex issues which will have to be thoroughly examined in light of the new policies before any final decision can be made."

47. On May 19, 1977, President Carter issued Presidential Directive 13 ("PD 13") setting forth the administration's policy guidelines with regard to arms transfers. PD 13 provided that:

"The United States will henceforth view arms transfers as an exceptional foreign policy implement, to be used only in instances where it can be clearly demonstrated that the transfer contributes to our national security interest."

To implement the Administration's policy of arms export restraint, PD 13 established stringent controls applicable to all foreign arms transfers except those to NATO countries, Japan, Australia and New Zealand. In substance, PD 13 provides: (a) The United States will not be the first supplier to introduce into a region newly developed, advanced weapons systems which would create a new or significantly higher combat capability in that region; (b) no commitment for sale or co-production of such weapons will be authorized until they are operationally deployed with United States forces; (c) development or significant modification of advanced weapons systems solely for export will not be permitted. Co-production agreements for significant weapons, equipment and major components (beyond operational subcomponents and the fabrication of higher turnover rate spare parts) are similarly limited.

48. Subsequent to the promulgation of PD 13, Northrop initiated a campaign to persuade the United States Government that PD 13 should not result in a preclusion of sales of its proposed F-18L to foreign countries. Northrop complained that the United States Government was discriminating against Northrop's proposed F-18L by permitting the sale of General Dynamics' F-16 while not allowing the sale of the F-18L. Northrop argued that the F-18L did not represent a significant modification of the McDonnell F-18A and was essentially in the operational inventory of the United States Armed Forces as the F-18A, and therefore, the F-18L should fall within the permissible export guidelines of PD 13.

49. Northrop also carried on a vigorous campaign, beginning in early 1976 and continuing at least through June 1977, to persuade the United States Government to permit the sale of Northrop's then proposed F-18L day fighter to Iran. The United States Government, however, ultimately refused to permit the sale to Iran. During this period and thereafter, despite its eagerness for a sale and its disappointment with the Government's decision, Northrop repeatedly expressed its position that any foreign sale of F-18 aircraft was necessarily and properly subject to the control of the United States Government.

50. The F-18 aircraft is an advanced military weapons system designed, developed and manufactured at the instance of the United States. It is specifically listed as major defense equipment on the U.S. Munitions List and therefore is subject to the requirements, among others, of the International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. § 2751, *et seq.*; The International Traffic In Arms Regulations, 22 C.F.R. § 121, *et seq.*; and Presidential Directive 13.

51. The United States Government is the sole domestic procurer of advanced military weapons systems such as the F-18. The purchase, sale and use of the F-18, including its sale to foreign governments, is under the exclusive control of the

United States Government, through the Executive and Legislative Branches.

52. Arms transfers and security assistance generally are essential elements of United States foreign policy. Foreign military sales, directly or indirectly through the United States Government, can only be made when such transfers are in the security interests of the United States and its allies. Determinations respecting the security interests of the United States and its allies, as those interests interrelate with the sale or transfer of military technology, are exclusively vested in the Executive and Legislative Branches of Government.

53. The record is replete with statements by Northrop acknowledging the Government's plenary power to direct and control the foreign sale of military aircraft, including the F-18.

54. The Legislative and Executive Branches of the United States Government have the exclusive constitutional right to govern and control United States foreign policy, including the power to decide whether to provide military weapons systems such as the F-18, or related data and technology to foreign countries and, if so, who will be prime contractor for any proposed sale, what configurations will be offered, to which foreign countries, and under what terms and conditions.

55. Any export of major defense equipment, such as the F-18, regardless of whether that transaction is structured on a Foreign Military Sale basis through the United States Government or a Government licensed commercial sale basis, requires an agreement between the two governments involved as to the terms of the transfer and use of such equipment before the transaction can be concluded. Either government has the power to shape the transaction by withholding approval of the sale. The United States Government approves each proposal for export sale on a case by case basis in light of national security and foreign policy considerations defined by the Executive and Legislative Branches of the Government.

56. Any disclosure or dissemination of technical data by McDonnell or Northrop concerning F-18 aircraft to potential foreign customers is made either by the United States Government directly or only with the express authorization and approval of the United States Government.

57. Procurement of the design, development and production of military aircraft weapons systems for the defense of the Nation is a governmental function peculiarly left to an amalgam of Executive and Legislative agencies. In the exercise of its plenary powers in the fields of national security, military affairs and foreign policy, the Government, subject only to self-imposed limitations, has the right to designate the who, what, when and where of weapon systems production and sale. The relief sought by Northrop—injunctive, declaratory or damages—would effectively limit and restrict the Government's unlimited rights in and to the technology, design and data incorporated in the F-18 aircraft, and affect and encumber its rights to determine who will be prime contractor to manufacture it, at which times, in what configuration, for whom and upon what terms.

58. The judicial relief which Northrop seeks is an order which (a) would effectively eliminate McDonnell as a source from which the United States Government could procure F-18's for use by its Air Force; (b) would limit McDonnell to being a source from which the United States Navy could purchase for its own use only F-18's fully capable of carrier operation; (c) would limit McDonnell as a source from which the United States Government could procure F-18's for sale to foreign governments, or through which the Government could make F-18's available to foreign governments, by precluding McDonnell from selling or offering for sale abroad F-18's other than those which are both "carrier-suitable" and in conformity with the structure and configuration of F-18 aircraft being purchased by the Navy for its own use; and (d) would further limit McDonnell as a source of F-18's to the United States and foreign governments by requiring that McDonnell acquire specific F-18 components from Northrop on terms acceptable sole-

ly to Northrop and by prohibiting offset or coproduction of, or any requirement of offset or coproduction in respect of, work associated with such F-18 components, regardless of United States foreign policy and national security interests.

CONCLUSIONS OF LAW

1. Government policy regarding the acquisition of rights in technical data relating to military equipment is set forth in Armed Services Procurement Regulation ("ASPR") Section 9, Part 2. ASPR's, recently redesignated "Defense Acquisition Regulations" ("DAR's"), are federal regulations having the full force and effect of law. *ITT Artic Services, Inc. v. United States*, 524 F.2d 680 (Ct. Cl. 1975); *Victory Constr. Co. v. United States*, 510 F.2d 1379 (Ct. Cl. 1975); *Dravo Corp. v. United States*, 480 F.2d 1331 (Ct. Cl. 1973); *Chris Berg, Inc. v. United States*, 426 F.2d 314 (Ct. Cl. 1970).

2. Pursuant to ASPR § 9-202.2(b), the Government acquires unlimited rights in the following types of data:

"(1) technical data resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance in a Government contract or subcontract;

2. technical data necessary to enable others to manufacture end-items, components and modifications, or to enable them to perform processes, when the end-items, components, modifications or processes have been, or are being, developed under Government contracts or subcontracts in which experimental, developmental or research work was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense."

The acquisition of unlimited rights in technical data gives the Government the right to "use, duplicate, or disclose" such data "in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." ASPR § 9-201(d).

3. The Government also acquires unlimited rights in technical data relating to items partially developed at private ex-

pense, but completed at Government expense. *See, e.g.*, Comp. Gen. Dec. No. B-167020, 49 Comp. Gen. 124, 14 CCF ¶ 82,985 (1969). For the underlying rationale for this rule, see *In re Chromalloy Division-Oklahoma of Chromalloy American Corp.*, Comp. Gen. Dec. No. B-187051, 77-1 CPD ¶ 262 at p. 18 (April 15, 1977), quoting R. Hinrichs' "Proprietary Data and Trade Secrets under Department of Defense Contracts," 36 *Military L. Rev.* 61, 76 (1967). *See also* Comp. Gen. Dec. No. B-174866, 18 CCF ¶ 81,876 (December 4, 1972).

4. When the Government procures and pays for the development of an end product under a research and development contract, the Government will be regarded as the owner of trade secrets and proprietary data generated in connection therewith, unless the contract expressly provides to the contrary. Comp. Gen. Dec. No. B-152684, 10 CCF ¶ 72,919 (February 5, 1965). Under the Comptroller General's view, the rights in data clause merely reinforces the Government's plenary, common law right to reproduce any item procured under a Government funded development contract unless the contract specifically restricts the Government's right to do so.

5. ASPR § 7-104.9 contains the standard contract clause currently implementing the Government's data acquisition policy, pursuant to which the Government acquires unlimited rights in all technical data developed in the performance of a contract subject to certain limitations not applicable to any of the data which is the subject of this action.

6. The standard ASPR data rights clauses were incorporated into Northrop's prime contracts with the Government for the YF-17 lightweight fighter prototype demonstration program and for the F-17 and NACF proposal efforts. They were also incorporated into McDonnell's prime contracts and Northrop's subcontracts relating to the sustaining engineering effort for, and the full scale developments of, the F-18.

7. The YF-17, F17 and F-18 data and technology claimed as proprietary by Northrop (which, according to Northrop, incorporates all of the fundamental designs and technologies of

its P-530 and P-630 concepts) was developed and incorporated into the designs of these aircraft by or for Northrop in fulfillment of its obligations under Government prime contracts and subcontracts under Government prime contracts. It is uncontested that the United States has unlimited rights in the YF-17, F-17 and F-18 data and technology. Northrop does not contest in this action the fact that the Government has unlimited rights in all the data and technology provided in the design, development, manufacture and test of the F-18 aircraft.

8. Northrop alleges that all of the fundamental design concepts, features and technology it developed in connection with its P-530, P-630, YF-17 and F-17 efforts have evolved into and have been infused and incorporated in the F-18 aircraft being built for the Navy. Under the aforementioned contracts, the Government has paid for and has obtained unlimited rights in the technical data necessary to produce the F-18 aircraft. In turn, McDonnell through its F-18 subcontract with Northrop has paid Northrop hundreds of millions of dollars for all of the technical data and know-how required to design, develop, fabricate, qualify, test, document and deliver those portions of the F-18 furnished by Northrop, and under the express terms of the subcontract, McDonnell owns all such data. If Northrop ever had any proprietary rights in any data, technology or know-how relating to its P-530, P-630, YF-17, and F-17 designs superior to McDonnell and the Government, such rights have lapsed as a consequence of the incorporation into the F-18 of such data, technology and know-how. Northrop no longer can claim rights in that property superior to either the Government or McDonnell.

9. Pursuant to the United States Constitution, Articles I and II; The Foreign Assistance Act, 22 U.S.C. § 2151, *et seq.*; The International Security Assistance and Arms Export Control Act, 22 U.S.C. § 2751, *et seq.*; Presidential Directive 13; and the International Traffic In Arms Regulations, 22 C.F.R. § 121, *et seq.*, among others, the Executive and Legislative Branches of Government possess and exercise plenary power

and control over military procurement practices and foreign military sales of major defense equipment specifically listed on the U.S. Munitions List, including those relating to the F-18 aircraft.

10. The decision to dismiss a case for failure to join an indispensable party in a matter that lies largely within the discretion of the court. Whether a person is "indispensable", that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968). Any judicial decision on whether to proceed or dismiss "must be made on the basis of practical considerations, and not by 'prescribed formula.'" *Id.* at 116 n.12.

11. A party seeking dismissal for failure to join an indispensable party is not required to establish as an uncontroverted fact that joinder is necessary to achieve complete relief or that the interests of the absent party will be prejudiced if the case proceeds to a decision on the merits. Decisions on the issue as to whether additional parties are necessary in order to achieve complete relief between present parties are by nature made on a hypothetical basis. For a Court to wait until all the evidence is adduced to determine the need for joinder of additional parties would create a risk of unjustifiable delay in the resolution of a controversy and a waste of the efforts of all involved. *Bradley v. School Board of the City of Richmond, Virginia*, 51 F.R.D. 139, 141 (E.D. Va. 1970). As long as the "vital factual issues" of a case have been joined, there is no reason to postpone the resolution of the indispensability problem until after the commencement of trial. *Haas v. Jefferson National Bank of Miami Beach*, 442 F.2d 394, 396 (5th Cir. 1971).

12. Rule 19(a), Fed. R. Civ. P., provides that a person shall be joined as a party if feasible under any of the following circumstances:

"if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest

relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of this claimed interest."

Any one of these considerations is sufficient to require joinder of an absent party if feasible. 3A *Moore's Federal Practice*, ¶ 9.07-1[0], p. 121, 129 (2d Ed. 1979); 7 Wright & Miller, *Federal Practice and Procedure: Civil* § 1604, p. 33, 35 (1972). All of the factors are present in this case.

13. Northrop's failure to seek direct relief against the United States is not determinative of the question of indispensability. By definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair either the effectiveness of relief or their own or other present parties' ability to protect their interests. *Eldredge v. Carpenters* 46 N. California Counties Joint Apprenticeship and Training Comm., 440 F.Supp. 506, 518 (N.D.Cal. 1977).

14. The relief Northrop seeks directly affects not only McDonnell's rights and interests, but also vital property and contractual rights of the United States and its foreign policy and national security interests. The test of whether an action is one against the United States is not determined by the named parties but by the relief sought and the results of any judgment or decree which might be entered pursuant thereto. *Ogden River Water Users' Ass'n v. Weber Basin Water Conservancy*, 238 F.2d 936, 941 (10th Cir. 1956).

15. The test delineated in Rule 19(a)(1) is met in this case. In the absence of the United States, complete relief cannot be accorded between the parties because the United States Government retains its plenary power over military weapons system procurement and sale, and to the extent that the United States has unlimited rights in F-18 technical data and technology, it is entitled to use or disclose such data and

technology in any manner or for any purpose it sees fit. It has the overriding right to determine who will be prime contractor for F-18's, for what configurations, when and under what terms. Therefore, any judgment in this action in the absence of the United States could not grant the parties complete or adequate relief.

16. The test set forth in Rule 19(a)(2)(i) is also satisfied. While Northrop contends that this is a dispute between private parties, this so-called "private" dispute involves and affects property and rights in which the Government has an interest. Northrop's action, the issues involved and the results sought involve a determination of who can serve as prime contractor for the F-18 aircraft and under what circumstances, what particular configurations each can sell and to or for whom, who shall be subcontractors, upon what terms, and for what portions of the aircraft, in derogation of the Government's superior rights to make such determinations. Any decision would directly affect the Government's interests and rights in and to the F-18 and related data and technology as well as the Government's foreign policy and national security interests. The disposition of this case in the absence of the Government may as a practical matter impair or impede its ability to protect those interests.

17. Additionally, the test of Rule 19(a)(2)(ii) is met. Disposition of this action in the absence of the United States will leave McDonnell subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations.

18. All of the tests prescribed under Rule 19(a) for determining whether the United States is an indispensable party are satisfied. Accordingly, the United States is "a person to be joined if feasible" under Rule 19(a) of the Federal Rules of Civil Procedure.

19. The doctrine of sovereign immunity provides that the United States cannot be sued without its consent. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The sovereign may waive its immunity by statute, but such consent, if given,

may be subject to any conditions which Congress sees fit to impose. Since no act of Congress would permit Northrop to bring this particular action against the United States in this Court, the United States cannot be joined.

20. Subsection (b) of Rule 19 of the Federal Rules of Civil Procedure provides that, if a person described in subsection (a) of the rule cannot be joined, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Four factors, some of which overlap those guidelines set out in Rule 19(a), are relevant to this determination:

- 1) the extent to which a judgment rendered without the absent party might be prejudicial to him or those already parties;
- 2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- 3) whether a judgment rendered without the absent party will be adequate; and
- 4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

21. Applying the first guideline of Rule 19(b), judgment granting Northrop's requested relief in the absence of the Government would inevitably prejudice the Government as well as McDonnell. For example, if the Court granted Northrop's request for declaratory, injunctive or damages relief precluding or restricting or impeding McDonnell in serving as prime contractor for sales of any F-18's purchased by the United States Government for use by its Air Force, Navy or by or for foreign governments, such an order would effectively eliminate or restrict McDonnell as a potential source of such aircraft and therefore as a practical matter impair or impede the Government's rights and interests in the procurement, sale, configuration, deployment and use of the F-18 and the consequent conduct of its national defense and foreign affairs.

22. Considering the second test of Rule 19(b), the relief sought by Northrop cannot be fashioned to avoid potential prejudice to the United States. The relief sought by Northrop, whether injunctive, declaratory or damages relief, would necessarily limit the United States Government in its F-18 procurement decisions and its offering of the F-18 weapons system to foreign allies. Moreover, any relief entered on Northrop's claims would subject McDonnell to the imposition of double, multiple or inconsistent legal obligations on account of, among other reasons, its existing obligations to the Government under prime contracts concerning the F-18. Any finding that Northrop was entitled to the relief it seeks would necessarily require as a predicate a judicial determination that Northrop had reserved proprietary rights in the data and technology of the P-530, YF-17, F-17 and F-18 in derogation of the rights of the Government and McDonnell. Such a determination would in itself practically prejudice rights of the United States Government in the F-18 aircraft, and in its production, purchase, sale and use. *Schutten v. Shell Oil Co.*, 421 F.2d 869 (5th Cir. 1970); *Eldridge v. Carpenters 46 N. California Counties Joint Apprenticeship and Training Comm.*, 440 F.Supp. 506 (N.D. Cal. 1977).

23. The relief sought in Northrop's First Amended Complaint would also, under the third guideline of Rule 19(b), provide only inadequate relief to Northrop in the absence of the Government because no judgment entered would bind the Government. The Government will remain able to override or ignore the Court's ruling and to obtain F-18's from McDonnell, even though, as a practical matter, its ability to do so may be impeded. Since McDonnell's rights in the F-18 will never be used except in conjunction with Government authorized procurements, any decree entered by this Court in the absence of the Government would amount to nothing more than an advisory opinion and is, therefore, impermissible under Section 2 of Article III of the Constitution. A justiciable controversy is not presented when a party seeks only an advisory opinion. *Flast v. Cohen*, 392 U.S. 83, 85 (1968); *Muskrat v.*

United States, 219 U.S. 346 (1911); *Hayburn's Case*, 2 U.S. 409 (1792); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316 (1945); *Imperial Irrigation Dist. v. Nevada-California Elec. Corp.*, 111 F.2d 319 (9th Cir. 1940); *Stanton v. Ash*, 384 F.Supp. 625, 631 (S.D. Ind. 1974).

24. Applying the fourth guideline of Rule 19(b), Northrop does have adequate remedies potentially available to it despite dismissal of this action. Underlying each of Northrop's claims is its allegation that somehow it has not been fairly compensated for its proprietary data, technology and know-how in connection with the development of the F-18 aircraft (despite the fact that it has been paid hundreds of millions of dollars in connection with its effort). Northrop has potential remedies available to it under 22 U.S.C. § 2356, 10 U.S.C. § 2273, and 28 U.S.C. §§ 1349(a)(2) and 1491. In addition, Northrop can pursue political avenues for relief through petitions of the Executive and Legislative Branches of the Government and through cognizant government personnel responsible for the procurement of the F-18 aircraft and responsible for the sale of such aircraft to foreign customers. In any event, dismissal for failure to join an indispensable party is not dependent upon ultimate relief being available to plaintiff elsewhere. *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied sub nom.*, *Susenkewa v. Kleppe*, 425 U.S. 903 (1976); *American Optical Company v. Curtiss*, 59 F.R.D. 644, 648 (S.D.N.Y. 1973).

25. Northrop urges as controlling authority the decision in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (D.C. Cal. 1971), *aff'd on the District Court's opinion*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972). If Northrop depends upon *Occidental Petroleum* the dependence is totally misplaced. Judge Pregerson, in deciding the indispensable party issue, does no more than apply the general rules governing Rule 19 joinder to the facts of the case. Although helpful in that analysis, it does not address the issue here where the interest of the United States Govern-

ment subsumes the very subject matter of the action; i.e., data and technology surrounding the F-18 development contracts. Without determination of United States Government derivative rights and the so-called derivative "flow-down" rights claimed by McDonnell no meaningful relief can be given by this Court.

26. The United States Government is both necessary and indispensable to the equitable and just determination of the controversy framed by the allegations of Northrop's First Amended Complaint. The factors and guidelines delineated in Rules 19(a) and 19(b) compel that in equity and good conscience Northrop's action be dismissed.

27. In addition to requiring dismissal for failure to join an indispensable party, Northrop's First Amended Complaint fails to state a claim upon which relief can be granted because it requires for its resolution inquiry into nonjusticiable political questions not amenable to resolution by the Judiciary. The relevant considerations for determining whether a given claim involves nonjusticiable political questions are:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. A lack of judicially discoverable and manageable standards for resolving the issue; or
3. Impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion; or
4. Impossibility of a court's undertaking independent resolution of the issue without expressing lack of the respect due coordinate branches of government; or
5. An unusual need for unquestioning adherence to a political decision already made; or
6. The potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

28. Decisions concerning the procurement and sale of major military weapons systems such as the F-18 are con-

stitutionally committed to the Executive and Legislative Branches of the United States Government. There are no judicially discoverable standards for determining the complex political, military and foreign affairs issues raised by Northrop's claims.

29. The relief sought by Northrop in the First Amended Complaint requires that the Court decide who will be the exclusive source of the F-18 weapons system for each of the several branches of the United States Armed Forces and for the armed forces of our foreign allies. Northrop's claims, which require for their resolution judicial inquiry into foreign policy and national defense decisions made by the Government, alone or in concert with our foreign allies, entail particularly delicate political and military questions involving significant elements of policy and prophecy which the judiciary has neither the aptitude, facilities or responsibility to decide. *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). These national defense and foreign policy questions and determinations involve issues only appropriate for "nonjudicial discretion."

30. Independent judicial resolution of the issues raised in this action would be of questionable validity and effectiveness, would express a lack of respect properly due the coordinate branches of Government, and would create a potentiality for embarrassment as a result of conflicting pronouncements by the Judicial and Executive Branches on the rights of the parties in and to the F-18 aircraft. Even inadvertent judicial interference in the constitutionally allocated decision-making process could have disastrous results and prove a serious embarrassment to the Government.

31. What Northrop asks this Court to decide is who will be the exclusive builder (prime contractor) for the carrier-suitable or land-based versions of the F-18 weapons system. Northrop would, in effect, make this Court the superprocurer and sales licensor of a military weapons system. Considera-

tions of the separation of powers and of the complex statutory structure relegating to the Executive Branch of the United States the concerns for the military arsenal—its development, procurement and deployment—bring this case within the political question considerations delineated in *Baker v. Carr*, *supra*, and therefore it should be dismissed.

32. In addition to the grounds of failure to join an indispensable party and nonjusticiability because of the political question doctrine, Northrop's action warrants dismissal for nonjusticiability because of the Act of State doctrine. Adjudication of Northrop's claims that McDonnell's allegedly illegal acts have caused or will cause Northrop to lose potential foreign sales of its F-18L weapons systems would require judicial inquiry into the military procurement decisions of foreign states in order to establish that McDonnell's actions caused or will cause the injury alleged. The Act of State doctrine precludes judicial inquiry into the motivation behind the official acts of foreign governments. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Act of State doctrine "precludes the Courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). Selection of a military aircraft weapon system by a sovereign state requires determinations with respect to its national security and foreign policy interests clearly comprehended by the Act of State Doctrine. *Underhill* and *Sabbatino* require dismissal.

33. Ninth Circuit views of the Act of state doctrine as expressed in *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (D.C. Cal. 1971), and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976) are not in conflict with such a decision.

34. All foreign transfers of major defense equipment, such as the F-18, must be conducted pursuant to the provisions of the Foreign Assistance Act of 1961, 22 U.S.C. § 2151, *et seq.*; the International Securities Assistance and Export Control

Act of 1976, as amended, 22 U.S.C. § 2751, *et seq.* (the "ISAAEC Act"); The International Traffic In Arms Regulations promulgated pursuant thereto, 22 C.F.R. § 121, *et seq.* ("ITAR"); Presidential Directives including, in particular, Presidential Directive 13 ("PD 13"); and the numerous Department of Defense and Department of State regulations and directives implementing the foregoing statutes and regulations.

35. The provisions of Section 606 of the Foreign Assistance Act of 1961, 22 U.S.C. § 2356, are applicable to all procurements conducted pursuant to the ISAAEC Act. *Hughes Aircraft Co. v. United States*, 534 F.2d 889 (Ct. Cl. 1976).

36. Title 22 U.S.C. § 2356 provides as follows with regard to the use of proprietary information in connection with military export sales activity:

"(a) Whenever, in connection with the furnishing of assistance under this chapter . . . information, which is (A) protected by law, and (B) held by the United States Government subject to restrictions imposed by the owner, is disclosed by the United States Government or any of its officers, employees, or agents in violation of such restrictions, the exclusive remedy of the owner . . . is to sue the United States Government for reasonable and entire compensation for such . . . disclosure . . ."

37. Pursuant to the requirements of the ISAAEC Act, ITAR, PD 13 and the implementing agency directives, all disclosures of technical data and information made in connection with proposed foreign sales, and foreign sales, of major defense equipment, such as the F-18, whether such sales are made on a Foreign Military Sale of United States Government licensed commercial sale basis, are made either by the Government directly or with the express license and approval of the Government through the use of specified Government channels.

38. Northrop's exclusive remedy for any claim based upon disclosure of allegedly proprietary information relating to the F-18 made in connection with a foreign sale, or proposed for-

eign sale, of the F-18 conducted pursuant to the statutes and regulations discussed above is an action against the United States pursuant to 22 U.S.C. § 2356 "for reasonable and entire compensation for such . . . disclosure"

39. The remedy provided by 22 U.S.C. § 2356 is by its very terms exclusive.

40. Title 10 U.S.C., § 2273(b) provides as follows:

"(b) any person who believes that (1) a design developed by him after July 2, 1926, relating to aircraft or an aircraft component, is being used; or (2) an article embodying a design developed by him after July 2, 1926, relating to aircraft or an aircraft component, is being used or manufactured by or for the United States without just compensation to him from the United States or any other source may, within four years from the date of that use or manufacture, sue in the Court of Claims to recover reasonable and entire compensation."

41. The claims Northrop alleges in its First Amended Complaint are properly redressable under 10 U.S.C. § 2273(b), but cannot be pursued against the Government in this Court under the terms of that statute.

42. Although 10 U.S.C. § 2273 provides an avenue of recovery available to Northrop, the remedy provided by that statute is not exclusive.

43. Although Northrop may also have a potential remedy under the Tucker Act, 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1491, that statute does not defeat the jurisdiction of this Court.

44. When material facts are not in dispute and only questions of law remain to be resolved, *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), should not deter a trial court from making summary disposition of a claim without penalizing the parties with long and expensive pre-trial practices that would lead to the same result.

45. The Basic Agreement and August 26, 1976 Agreement, as Northrop would have this Court construe and enforce them,

constitute an allocation of markets between horizontal competitors, *per se* violative of Section 1 of the Sherman Act. Under Northrop's interpretation of those agreements, McDonnell is limited to selling F-18's only to the United States Navy for its own use, and then only if fully equipped for use from carriers, and to selling to or for the use of foreign countries, either directly or through the United States Government, F-18 aircraft that are both carrier-suitable and conform to the configuration and structure of F-18 aircraft being purchased by the Navy for its own use, while Northrop is allocated the exclusive right to all other F-18 marketing opportunities, including the exclusive right to all Air Force sales, even in the exact Navy configuration. Such an interpretation amounts to a horizontal allocation of the world market for the F-18 aircraft, restricting McDonnell to both specific customers and versions of the product which are effectively customer specific, and reserving all other sales to Northrop. To enforce such an interpretation and grant Northrop the relief it seeks would be to enforce an unlawful allocation of the market. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States v. Associated Patents, Inc.*, 134 F.Supp. 74 (E.D.Mich. 1955), *aff'd Mac Invest Co. v. United States*, 350 U.S. 960 (1956).

46. An adoption by this Court of Northrop's construction of the Basic Agreement and the August 26, 1976 Agreement with respect to Northrop's claimed work share under McDonnell prime contracts for F-18 aircraft would implement and enforce the illegal allocation of markets Northrop seeks. It also would preclude other contractors from competing under any circumstances for subcontract work under McDonnell F-18 prime contracts, in particular after Northrop's rejection or anticipatory rejection of subcontract offers, and would, therefore, result in an illegal restraint of trade in the market for such subcontract work. Northrop's interpretation in these respects, if adopted by this Court, would serve to create or facilitate the creation of restraints of trade and allocation of the market for F-18 aircraft between the parties. Such result would be contrary to Section 1 of the Sherman Act and cannot be countenanced by this Court.

47. Horizontal restraints on competition are not a permissible means of preserving competitors or developing new forms of competition because the risk created by the restraint exceeds any potential benefits to be derived from such arrangements. *United States v. Topco Associates, Inc.*, *supra*.

48. McDonnell and Northrop are horizontal competitors, competing in the market for military aircraft weapons systems sales. There is no vertical aspect to the relationship between Northrop and McDonnell insofar as that relationship is concerned with the parties' respective rights to offer and sell F-18 aircraft.

49. There is no "unique industry context" with respect to the horizontal division of the market for F-18 aircraft which would justify shielding the Basic Agreement and the August 26, 1976 Agreement, as Northrop would have this Court construe and enforce them, from *per se* treatment under Section 1 of the Sherman Act.

50. As Northrop would have this Court construe them, the Basic Agreement and the August 26, 1976 Agreement would not enhance competition and, in any event, since such agreements under Northrop's interpretation are *per se* violative of Section 1 of the Sherman Act, the competitive impact of the agreements is irrelevant and need not be considered by this Court. *United States v. Topco Associates, Inc.*, *supra*.

51. The Teaming Agreement and Basic Agreement between Northrop and McDonnell do not constitute a license of data or technology from Northrop to McDonnell.

52. The Teaming Agreement, Basic Agreement and the August 26, 1976 Agreement between McDonnell and Northrop constitute and reflect "contractor team arrangements" pursuant to, authorized and limited by, and within the meaning of ASPR § 4-117, which provides specifically that the policies authorizing the formation of such arrangements "do not autho-

size arrangements in violation of the anti-trust statutes and do not limit the Government's rights to:

- (i) approve contracts in accordance with ASPR;
- (ii) determine the responsibility of a prime contractor on the basis of the stated contractor team arrangement;
- (iii) provide the selected prime contractor with data rights owned or controlled by the government; and
- (iv) pursue its policies on competitive procurement sub-contracting and component breakout, after initial production procurement or at any other time."

53. Contractor team arrangements are not in and of themselves violative of Section 1 of the Sherman Act. However, to the extent that particular teaming arrangements provide for an allocation of markets between horizontal competitors as Northrop would have the Court construe and enforce the agreements at issue in this case, they do violate Section 1 of the Sherman Act.

54. Even assuming, *arguendo*, that the Basic Agreement were a license of data, technology and know-how from Northrop to McDonnell, the particular restraints Northrop would have this Court impose upon McDonnell under its interpretation of the Basic Agreement cannot be justified as being "ancillary" to the purported licensing aspects of the Agreement. Any "licensing" aspect of the Basic Agreement is collateral to the proscribed horizontal division of markets inherent in Northrop's interpretation, and therefore the Agreement, if so construed, is illegal under Section 1 of the Sherman Act, notwithstanding the claimed existence of a "license." *Timken Roller Bearing Company v. United States*, 341 U.S. 593 (1951).

55. Even assuming, *arguendo*, that the Basic Agreement were a license of data, technology and know-how from Northrop to McDonnell, the restrictions placed on McDonnell pursuant to Northrop's interpretation of the Agreement are illegal under Section 1 of the Sherman Act because such restrictions on McDonnell's ability to compete are limited neither to the

useful secret life of the alleged technology transferred nor to products made by use of that technology. *United States v. Timken Roller Bearing Company*, 83 F.Supp. 284 (N.D. Ohio 1949), *modified on other grounds*, 341 U.S. 593 (1951).

56. Northrop's "ancillary restraint" defense of the Basic Agreement's market allocation provisions is also deficient in that it fails to take into account the mutual, rather than one-sided, exchange of technology between McDonnell and Northrop provided for in the Agreement. Since the Basic Agreement provided that the parties were to receive their *quid pro quo* in a mutual exchange of data, the restrictions Northrop would impose on McDonnell cannot be justified as restraints reasonably ancillary to a license of technology. *United States v. General Elec. Co.*, 82 F.Supp. 753, 846-47 (D.N.J. 1949).

57. An antitrust violation is a permissible defense to a contract action where, as here, the judgment sought would, if granted by the Court, enforce the precise conduct made unlawful by the Sherman Act. *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959); *General Atomic Co. v. Exxon Nuclear Co.*, 79-2 Trade Cases ¶ 62, 966 (S.D.Cal. 1979); *American Indus. Fastener Corp. v. Flushing Enterprises, Inc.*, 362 F.Supp. 32, 39-41 (N.D. Ohio 1973).

58. Summary judgment is appropriate to dismiss a claim where the relief requested, as that requested by Northrop, would violate the antitrust laws. *General Communications Engineering v. Motorola Communications and Electronics, Inc.*, 421 F.Supp. 274 (N.D. Cal. 1976).

59. For the purposes of Section 2 of the Sherman Act, the phrase "'attempt to monopolize' means the employment of methods, means, and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed . . . for the purposes of such accomplishment.'" *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946). Monopolization in the context of Section 2 of the Sherman Act

is defined as the power to exclude competitors in a relevant market. *Id.*

60. Attempt to monopolize cases are peculiar because they, even more than merger cases, deal in probabilities of success in the market delineated by the product and the geographic marketing capabilities of the producers.

61. This peculiarity is exacerbated by the very purpose of competition. Competition, to be effective, requires that the participants "attempt" to sell all of the product they can produce to the exclusion of competitors in the same product and geographic market. The mere intention of a party to prevail over a competitor is insufficient to establish the "specific intent to monopolize by some illegal means" necessary to establish a cause of action for attempt to monopolize. *General Communications Engineering, Inc. v. Motorola Communications and Electronics, Inc.*, 421 F.Supp. 274, 287 (N.D. Cal. 1976). Moreover, the antitrust laws were enacted not to protect competitors but rather to assure free and aggressive competition in the market place of trade or commerce among the several States, or with foreign nations. *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Northrop's arguments are all competitor—protective oriented. What is disturbing is that traditional considerations of competition and commerce do not adequately answer the concerns of the Court in analysis of F-18 sales activity.

62. The concerns of product and geographic market from the traditional antitrust viewpoint are unimportant here for one very basic reason. The United States Government has the absolute and overriding control of both the production and sales potential of the product, the F-18 military weapons system.

63. What strikes the Court under such circumstances is that there is not the "trade or commerce among the several States, or with foreign nations" essential to antitrust concerns of monopolization, including the critical inquiry here—attempt

to monopolize. The United States Government *is the market* concerned with production and distribution of weapons systems for governmental military establishments. The Foreign Assistance Act, 22 U.S.C. § 2151, *et seq.*, International Security Assistance and Arms Control Act, 22 U.S.C. § 2751, *et seq.*; and International Traffic In Arms Regulations 22 C.F.R. § 121, *et seq.*, comprehensively give the Government plenary power in military procurement and arms export practices. As such, this differs from the basic thrust of antitrust laws applicable to governmental procurement practices in competition with consumer enterprises buying goods generally available in the marketplace.

64. The United States Government also makes the world market. No single group of producers has any power to expand a market share beyond that considered by the United States Government in the implementation of domestic defense and foreign policy to be in the best interest of its citizens.

65. Political considerations aside, the monopoly, if any, enjoyed or threatened by McDonnell is a governmental creation outside the reaches of Section 2 of the Sherman Act. See *Olsen v. Smith*, 195 U.S. 332 (1904); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966); *Independent Taxicab Operators' Ass'n. v. Yellow Cab Co.*, 278 F.Supp. 979 (N.D. Cal. 1968).

66. Northrop cites *Ovitron Corp. v. General Motors Corp.*, 295 F.Supp. 373 (S.D.N.Y. 1969) (Ovitron I) as support for the application of the Sherman Act to governmental procurement activities. Ovitron I is distinguishable. The court there was concerned with a very clear charge of predatory pricing. More importantly, Ovitron I does not reach the issue presented here; i.e., the impact of the government's absolute ability to make the market. Northrop, in a motion to correct the record, has gone outside of the record upon which the court in Ovitron made its decision. But even taking all of the facts Northrop would now have this Court consider in reading the decision in Ovitron I the result would not change.

67. *Ovitron Corp. v. General Motors Corp.*, 364 F.Supp. 944 (S.D. N.Y. 1973), *aff'd per curiam*, 512 F.2d 442 (2nd Cir. 1975) (*Ovitron II*) suggests the impossible task Northrop would have in proving antitrust damage. To prove such damage Northrop would have to show that it would be the successful bidder in the procurements it alleges have been frustrated by McDonnell's conduct. Aside from the political question and act of state problems already discussed, Northrop still faces the task of showing that the United States Government would turn to it for its F-18 needs. The only way this Court can conceive that it could be done would be to show an *absolute* need of F-18 weapons systems by the United States and its chosen allies in military procurement. Added to the *absolute* need would be this Court's award of Northrop's prayed for relief giving it the *exclusive* right to bid the F-18 weapons systems apportioned to it by the Basic Agreement as Northrop would have had this Court construe and enforce it. In light of the disposition made of the restraint of trade issue herein that cannot come to pass.

68. The overt acts with which McDonnell is charged do not constitute the type of predatory conduct necessary to establish a cause of action for attempt to monopolize under Section 2 of the Sherman Act. *General Communications Engineering, supra*; *Laurie Visual Etudes, Inc. v. Chesebrough-Ponds, Inc.*, 473 F.Supp. 951 (S.D.N.Y. 1979).

69. Summary judgment is appropriate on Northrop's claims for damages in Northrop's Fourth, Fifth, Sixth, Seventh, and Eighth causes of action because no injury in fact is shown. *Southern Concrete Co. v. United States Steel Corp.*, 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977); *Block v. Tobin*, 45 Cal.App.3d 214, 119 Cal. Rptr. 288 (1975).

70. An illegal contract, such as the Basic Agreement and August 26, 1976 Agreement as construed by Northrop, will not support a claim for unfair competition under California law. *Television Adventure Films Corp. v. KCOP Television, Inc.*, 249 Cal.App.2d 268, 278, 57 Cal. Rptr. 526 (1967).

71. Summary judgment also is proper as to the Seventh Cause of Action because it does not allege a combination between McDonnell and any other person and, therefore, fails to state a claim for relief under California Business and Professions Code §§ 16,700, *et seq.* Cf. *Bondi v. Jewels by Edward, Ltd.*, 267 Cal.App.2d 672, 678, 73 Cal.Rptr. 494, 498 (1968).

DATED: Dec. 1, 1980

/s/ Manuel Real
United States District Judge

**ORDER OF DISTRICT COURT DISMISSING FIRST
AMENDED COUNTERCLAIM AND GRANTING SUMMARY
JUDGMENT**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL NO. 79-04145 R

NORTHROP CORPORATION,

Plaintiff,

v.

MCDONNELL DOUGLAS CORPORATION,

Defendant.

**ORDER DISMISSING FIRST AMENDED COUNTERCLAIM
AND GRANTING SUMMARY JUDGMENT**

Plaintiff Northrop Corporation having moved this Court to dismiss Defendant's First Amended Counterclaim and for summary judgment thereon, and the Court having considered Plaintiff's motion, the arguments and memoranda of points and authorities presented by counsel in connection therewith and the entire record herein, and the Court having concluded that Plaintiff's motion should be granted, it is this ____ day of October, 1980

ORDERED AND ADJUDGED that:

1. Plaintiff's motion to dismiss Defendant's First Amended Counterclaim (hereinafter "the Counterclaim") for failure to join an indispensable party is granted.

2. Plaintiff's motion to dismiss the Counterclaim for lack of subject matter jurisdiction, on the ground that the remedy provided by 22 U.S.C. § 2356 is exclusive, is granted.

3. Plaintiff's motion to dismiss the Counterclaim for failure to state a claim upon which relief can be granted on the bases of the political question and act of state doctrines is granted.

4. Plaintiff's motion to dismiss the Counterclaim for failure to state a claim upon which relief can be granted, and for summary judgment, on the grounds that to grant the injunctive, declaratory or damages relief sought by Defendant in the Counterclaim would require the Court to enforce contractual provisions that are *per se* violative of Section 1 of the Sherman Act, is granted.

6. Defendant's Counterclaim is hereby dismissed, with prejudice, and at Defendant's costs.

DATED: DEC 1 1980

/s/ Manuel Real

UNITED STATES DISTRICT JUDGE

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
PLAINTIFF NORTHROP CORPORATIONS MOTION FOR
SUMMARY JUDGMENT**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL NO. 79-04145 R

NORTHROP CORPORATION,

Plaintiff,

v.

MCDONNELL DOUGLAS CORPORATION,

Defendant.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
PLAINTIFF NORTHROP CORPORATION'S MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Rule 3(g) of the Local Rules of this Court, and consistent with the conclusions reached by the Court in its Opinion dated September 5, 1980, Plaintiff Northrop Corporation submits the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. McDonnell Douglas Corporation's ("McDonnell's") First Amended Counterclaim seeks from the Judiciary injunctive, declaratory, and damages relief with respect to Northrop's manufacture and marketing to the United States and foreign countries of the F-18 military aircraft weapons system.

2. Pursuant to Counts I and II of the First Amended Counterclaim, McDonnell seeks, in essence, (a) a declaration of its and Northrop's rights under the agreements establishing and defining the "joint business relationship" that obtains between the parties relative to F-18 aircraft, and (b) judicial enforcement of those rights.

3. Although they seek an interpretation of the parties' respective rights that differ from that advanced by Northrop, Counts I and II constitute a mirror image of, and arise out of the same facts and circumstances as, the First, Second and Third Causes of Action of Northrop's First Amended Complaint.

4. Pursuant to Counts III and IV of the First Amended Counterclaim, McDonnell seeks injunctive relief and damages for alleged acts of unfair competition and fraud on the part of Northrop in the negotiation and performance of the agreements establishing and defining the "joint business relationship" that obtains between the parties.

5. The claims advanced by McDonnell in Counts III and IV of the First Amended Counterclaim constitute a mirror image of, and arise out of the same facts and circumstances as, the Fourth and Seventh Causes of Action of Northrop's First Amended Complaint.

6. Pursuant to its Order dated September 5, 1980, the Court has held, *inter alia*, that each and every cause of action pleaded by Northrop in its First Amended Complaint should be dismissed because (a) the United States is an indispensable party to a determination of Northrop's claims, (b) they present claims that are beyond the subject matter jurisdiction of this Court, and (c) each and every claim for relief involves the resolution of non-justiciable political questions and of issues requiring the examination of acts of foreign states that are non-justiciable under the act of state doctrine.

7. Further pursuant to its Opinion dated September 5, 1980, the Court concluded that summary judgment should be entered in favor of McDonnell on the First, Second, Third, Sixth and Seventh Causes of Action of Northrop's First Amended Complaint on the ground, *inter alia*, that the agreements between the parties establishing and defining their "joint business relationship" effected a horizontal allocation of markets *per se* violative of Section 1 of the Sherman Act.

8. Maintenance of the First Amended Counterclaim would be inconsistent with the principles enunciated and conclusions reached in the Court's September 5, 1980 Opinion.

10. The conclusions of law, if any, which are findings of fact are hereby incorporated herein by reference.

CONCLUSIONS OF LAW

1. Based upon the conclusions reached by the Court with respect to the First Amended Complaint in its September 5, 1980 Opinion, the declaratory and injunctive relief requested by McDonnell's First Amended Counterclaim, and each and every claim for relief stated therein, presents nonjusticiable political questions, *Baker v. Carr*, 369 U.S. 186 (1962), and issues requiring the examination of acts of foreign states which are nonjusticiable under the act of state doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Underhill v. Hernandez*, 168 U.S. 250 (1897).

2. Based upon the conclusions reached by the Court with respect to the First Amended Complaint in its September 5, 1980 Opinion, the injunctive relief sought in the First Amended Counterclaim is improper and will not lie because it would adversely affect the interests of an absent party, the United States.

3. Based upon the conclusions reached by the Court with respect to the First Amended Complaint in its September 5, 1980 Opinion, the declaratory and injunctive relief requested by McDonnell to interpret the agreements between Northrop and McDonnell to allocate and not compete for customers of products in the same market would involve the Court in the specific enforcement of agreements *per se* violative of Section 1 of the Sherman Act (15 U.S.C. §§ 1, *et seq.*) in unreasonable restraint of interstate and international commerce, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1971).

4. Summary judgment is appropriate to dismiss a claim where the relief requested would violate the antitrust laws.

6. The findings of fact, if any, which are conclusions of law are hereby incorporated herein by reference.

7. Plaintiff is entitled to summary judgment and dismissal of the First Amended Counterclaim.

DATE: October 3, 1980

Respectfully submitted,

OVERTON, LYMAN & PRINCE
CROWELL & MORING
SHEPPARD, MULLIN, RICHTER &
HAMPTON

By /s/ John W. Chierichella
JOHN W. CHIERICHELLA
Attorneys for Plaintiff
NORTHROP CORPORATION

it is so ordered

Dated DEC 1 1980

/s/ Manuel Real

United States District Judge

SHERMAN ACT § 1, 15 U.S.C. § 1**Restraint of trade; resale price maintenance; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 [15 USCS § 45]: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat.

693; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, P.L. 93-528, § 3, 88 Stat. 1708.)

SHERMAN ACT § 2, 15 U.S.C. § 2

Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708.)

Rule 19. FED. R. CIV. P.

Joinder Of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

DEFENSE ACQUISITION REGULATION 4-117

Contractor Team Arrangements.

(a) *Definition.* A contractor team arrangement is one whereby two or more companies form a partnership or joint venture to act as a potential prime contractor or whereby a potential prime contractor agrees with one or more other companies to act as his subcontractor(s) under a specified Government procurement or program.

(b) *Policy.* There are times when it may be desirable, both from the Government and Industry standpoints, for companies to enter into a team arrangement prior to a Government contract award or thereafter. Team arrangements may be particularly appropriate for engineering and operational system developments, but may be used in other appropriate situations, including production procurement. Team arrangements allow a prime contractor and subcontractor to complement the unique capabilities of each and to offer the Government the best combination of capabilities to achieve the system performance, cost and delivery desired for the system being procured. The Government will recognize the integrity and validity of contractor team arrangements, *provided* they are identified and company relationships are stated in a proposal. Under a

contractor team arrangement, the prime contractor is fully responsible for the performance of the contract. The Government normally will not require or encourage dissolution of contractor team arrangements. These policies do not authorize arrangements in violation of anti-trust statutes and do not limit the Government's rights to:

- (i) approve subcontracts in accordance with ASPR requirements;
- (ii) determine the responsibility of a prime contractor on the basis of the stated contractor team arrangement;
- (iii) provide the selected prime contractor with data rights owned or controlled by the Government; and
- (iv) pursue its policies on competitive procurement, subcontracting and component breakout, after initial production procurement or at any other time.

DEFENSE ACQUISITION REGULATION 9-201

Definitions. For the purposes of this Part, the following terms have the meanings set forth below:

(a) *Data* means recorded information, regardless of form or characteristic.

(b) *Technical Data* means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental or engineering work; or be usable or used to define a design or process or to procure, produce, support, maintain, or operate materiel. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design type documents; or computer printouts. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications and related information, and documentation related to computer software. Technical data does not include computer soft-

ware or financial, administrative, cost and pricing, and management data, or other information incidental to contract administration.

(c) *Limited Rights* means rights to use, duplicate, or disclose technical data in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data, be (a) released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for reproduction of the computer software, or (c) used by a party other than the Government, except for:

- (i) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, *provided* that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or
- (ii) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (i) above.

(d) *Unlimited Rights* means rights to use, duplicate, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

DEFENSE ACQUISITION REGULATION 9-301.2

Policy. It is Government policy not to pay in connection with its contracts, and not to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for use of patents in which it holds a royalty-free license or charges for data which it has a right to use and disclose to others, or which is in the public domain, or

which the Government has acquired without restriction upon its use and disclosure to others. This policy shall be applied by the Departments (i) in negotiating contract prices for foreign license and technical assistance contracts (9-302) or supply contracts with second sources (9-303), and (ii) in commenting on such agreements when they are referred to the Department of Defense by the Department of State pursuant to Section 414 of the Mutual Security Act of 1954 as amended (22 U.S.C. 1934) and the International Traffic in Arms Regulations (see 9-304).

TEAMING AGREEMENT BETWEEN McDONNELL AND NORTHROP DATED OCT. 2, 1974

1. MDC and NOC agree to team for the purpose of developing, proposing and producing a USAF derivative of the YF-17 (USAF ACF) and a carrier-suitable version of the YF-17 (USN ACF) to satisfy U.S. Navy VFAX requirements.

2. Contract Responsibilities

MDC will be prime contractor on the USN ACF and NOC will be associate contractor. NOC will be prime contractor on the USAF ACF and for foreign variants of the USAF ACF and MDC will be associate contractor.

3. Design Responsibilities

It is the objective of both MDC and NOC to provide the highest degree of commonality between Navy and Air Force versions consistent with satisfying Navy VFAX requirements. MDC has the design responsibility for the USN ACF and NOC has the responsibility to furnish YF-17 and ACF design analysis and test data. NOC will provide data, design review participation, and on-site technical liaison at MDC to assure attaining this objective.

4. Division Of Effort

The division of design, test, and production and support effort will be determined mutually in a manner that is most efficient for both the USAF and USN ACF programs.

5. Funding Of Proposal Effort

Each corporation will fund its assigned effort in the event that no government funding is provided; if government funding is provided, it will be shared between the corporations in a manner mutually agreed.

6. Contract Terms

Associate contract work performed by NOC will be done to contract terms and conditions that are no more stringent than contained in the prime contract between the U.S. Navy and McDonnell Douglas Corporation. Associate contract work performed by MDC will be done to contract terms and conditions that are no more stringent than contained in the prime contract between the U.S. Air Force and NOC.

7. Duration

This agreement is in effect until mutually terminated by the parties thereto or in the following eventualities:

- 7.1 The U.S. Government announces that there is no procurement plan as a result of the ACF competition.
- 7.2 The U.S. Navy terminates the efforts of the MDC/NOC team to satisfy their requirements with a YF-17 derivative.
- 7.3 In any event, the agreement terminates 30 June 1975 unless mutually extended.

8. Definitization Of Agreement

The above constitutes a preliminary businessman's agreement which is intended to be the basis for further agreements to be definitized.

AGREE:

/s/ _____
S. N. McDonnell, President
McDonnell Douglas
Corporation

/s/ _____
T. V. Jones, President
Northrop Corporation

**THE "BASIC AGREEMENT" BETWEEN McDONNELL
AND NORTHROP DATED JUNE 27, 1975**

1. Definition

The "F-18" is a carrier-based derivative of NOC's YF-17 aircraft redesigned by NOC and MDC to satisfy the U.S. Navy's VFAX requirement.

2. Objective

The objective of the MDC/NOC joint business relationship is to work together (without in any manner intending to create a joint venture or otherwise incur or imply joint or several liability) for the purpose of obtaining and performing contracts for the development and production of derivatives of NOC's YF-17 aircraft that are responsive to the requirements of the U.S. Navy and foreign customers. Full advantage is to be taken by the parties of savings that can accrue from concurrent mutually supportive programs in such areas as development, production and utilization of common aircraft equipment items consistent with satisfying each customer's individual requirements.

3. Contract Responsibilities

- (a) The parties hereby agree that MDC will be prime contractor in connection with contracts with the U.S. Navy for the development of the F-18 and for the production of those F-18 aircraft purchased by the U.S. Navy for its own use. Furthermore, in the event a foreign customer desires to procure from MDC (either directly, or indirectly through the U.S. Navy) F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for the latter's present or future use (for example, configuration and equipment changes to achieve a reconnaissance capability for a potential customer would still be considered "basically the same" configuration), MDC will be prime contractor in connection with contracts for any such sale. NOC will participate in the performance of all of such contracts performed by MDC as prime contractor to the extent set forth in paragraph 5 hereof.

- (b) NOC may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the NOC YF-17 other than those referred to in paragraph (a) above.

4. Design Authority And Data Exchange

- (a) MDC shall have overall program management and design authority in connection with the contracts contemplated in paragraph 3(a) above, and NOC shall have such authority with respect to the contracts contemplated by paragraph 3(b).
- (b) NOC has and shall continue to furnish to MDC YF-17 and related aircraft design analysis and test data. MDC shall furnish to NOC F-18 design, design analysis and test data. Both parties will provide data, design review participation, and on-site technical liaison at the other's plant to assure that both parties are fully aware of the design and manufacturing activities of the other party. Such data may be used by the receiving party only in furtherance of the contracts referred to in paragraph 3 of this Agreement. Such usage shall be at no charge to the receiving party.

5. Division Of Effort

The division of the design, test, production, and support effort to be performed by the parties under the contracts referred to in paragraph 3(a) above will be as follows:

- (a) With respect to the F-18 Full Scale Development Program, NOC will perform, or have performed by others, approximately 30% of the associated direct labor hours and will procure appropriate material and subsystem development work. It is anticipated that NOC shall perform the tasks described in Attachment 1 hereto, which are estimated to equate to the effort share specified above. MDC will perform, or have performed by others, the balance of the FSD effort as described in Attachment 2.
- (b) It is anticipated that the division of effort on the F-18 Production Program will be such that NOC will perform, or have performed by others, approximately

40% of the cumulative average direct labor hours per aircraft associated with 800 F-18 airframes and will procure appropriate material and subsystems directly related to the NOC assigned production effort. It is anticipated that NOC shall perform the tasks described in Attachment 3 hereto, which are estimated to equate to the effort share described above. MDC will perform, or have performed by others, the balance of the Production Program effort as described in Attachment 4.

- (c) If the total FSD or production tasks available to MDC for assignment to MDC or NOC per Attachments 1 through 4 are reduced during program evolution, the work remaining will be rebalanced, if necessary, to achieve the division of effort percentages stated in paragraphs 5(a) and (b) above.
- (d) It is anticipated that NOC will perform appropriate support effort, including the manufacture of spare parts, for the flyable aircraft hardware it furnishes to MDC.
- (e) In the event that the NOC share of production, if accomplished per Attachment 3, exceeds 42% of the cumulative average direct labor hours for 800 aircraft (as reflected in the MDC production proposal to be submitted at the end of FSD and reflecting test aircraft manufacturing experience), the vertical tail production will be transferred to MDC.
- (f) In the event MDC is awarded any of the contracts contemplated by paragraph 3(a) hereof, MDC shall award contracts to NOC for the performance of the foregoing work associated therewith except and to the extent the U.S. Navy, pursuant to laws and regulations then in effect, specifically directs procurement thereof in some other manner. Both parties agree to exert their best efforts to avoid any such circumstance and to see that the division of effort that is specified herein is implemented.

6. Funding Of Proposal Effort

Each corporation will fund its own sales and proposal efforts in furtherance of the objectives and programs contemplated by

this agreement in the event that no U.S. Government or other customer funding is provided; if customer funding is provided, it will be shared between the corporations in a manner mutually agreed.

7. Contract Terms

Work performed by one party for the other will be done to contract terms and conditions that are no more severe than applicable terms contained in the prime contracts. Neither party is obligated to accept work from the other if the contract terms are unacceptable to the receiving party.

8. Marketing Activities

MDC shall have the responsibility to manage and conduct marketing activities relative to those contracts contemplated in paragraph 3(a). NOC shall have the responsibility to manage and conduct all other marketing activities with respect to the development and sale of aircraft derived from NOC's YF-17 aircraft. Either party may participate directly or indirectly in the marketing efforts of the other party whenever it is mutually determined that such participation is advantageous. Each party shall keep the other fully informed of its F-17/F-18 family marketing activities.

9. Duration

This Agreement shall remain in effect for so long as the U.S. Navy is actively considering the F-18 for satisfying its requirements and, if MDC is awarded a contract(s) for the F-18, for as long as the parties are performing contracts as contemplated in paragraph 3 hereof.

10. Proprietary Information

The parties hereafter in due course will enter into a proprietary data agreement covering the handling and treatment of data exchanged between them in furtherance of the programs or contracts undertaken by either of them as contemplated by

this Agreement. In the interim, all such data as exchanged may be used by the parties as required hereunder and the parties shall exercise reasonable diligence in safeguarding all such data from disclosure to third parties.

11. Publicity

MDC and NOC will consult and act jointly with respect to the communication of the understandings reflected herein to third parties.

12. Definitization Of Agreement

Such definitive agreements as may be entered into between MDC and NOC with respect to the subject matter hereof will be based on the understandings reflected herein.

13. Prior Agreement Superseded

This Agreement supersedes the agreement between the parties dated October 2, 1974

/s/ _____
S. N. McDonnell, President
McDonnell Douglas
Corporation

/s/ _____
T. V. Jones, President
Northrop Corporation

ATTACHMENT 1 TO NOC/MDC AGREEMENT

FULL SCALE DEVELOPMENT PROGRAM

NOC TASKS

The following effort will be performed by NOC, all under MDC direction and in accordance with the system definition and requirements to be established by MDC: Design, develop, fabricate initial special tooling and manufacture the center fuselage, aft fuselage and vertical tails of the F-18 test article. Perform design integration of the engines, air induction system and related propulsion systems within the fuselage struc-

ture. Design, develop and procure as necessary the Aircraft Mounted Accessory Drive; Engine Starting System; Environmental Control System; Fire Detection System; Fire Extinguishing System; Bleed Air Leak Detection System; Speed Brake and the Fuel System and Hydraulic System requirements for the above fuselage sections. Within the scope of Northrop's task and under MDC direction, Northrop will assist by providing transportation and packaging, reliability, maintainability, system safety, integrated logistics support and ground support equipment for the above aircraft sections and systems.

Further, NOC will test those systems and system elements to be designed above, including the necessary component development qualification tests and bench testing. Modifications as required and approved by MDC will be made to Northrop's existing YF-17 Flight Control Test Stand, Wind Tunnel Models and the two YF-17 prototypes in order for Northrop to conduct necessary ground and prototype flight testing in support of the F-18 program.

Northrop will provide support of all MDC F-18 flight testing.

For the FSD aircrafts the center fuselage section (excluding landing gear), aft fuselage section with vertical tail will be assembled and checked out as integrated packages complete with functional systems and equipment to the extent that it is economical. The center fuselage and aft fuselage sections will be joined and spliced at the manufacturing break and delivered to MDC in this configuration, less engines and any sensitive instrumentation and high value CFE.

ATTACHMENT 2 TO NOC/MDC AGREEMENT

FULL SCALE DEVELOPMENT PROGRAM

MDC TASKS

The following effort will be performed by MDC: Design, develop, fabricate tooling, and manufacture the forward fuselage, wing, including LEX, horizontal tail, and all related

components and installations, and final assembly and check out the F-18. Design, develop and procure, as necessary, all avionics, flight control system including actuators, landing gear, arresting hook, canopy and windshield, pylons, racks and all other subsystems of the aircraft, including fuel systems and hydraulic system requirements for the above airframe sections, and the total Electrical Power Generation System and related components. MDC is responsible for the total reliability and maintainability, system safety, integrated logistics support and ground support equipment for the F-18 and for the interface coordination with the engine contractor.

Total F-18 systems test and evaluation, except to the extent determined for NOC in Attachment 1, will be performed by MDC.

All design, development, test, manufacture and procurement responsibility not specifically described as NOC responsibility in Attachment 1, or as MDC responsibility above, shall be MDC responsibility.

**ATTACHMENT 3
TO NOC/MDC AGREEMENT
PRODUCTION PROGRAM
NOC TASKS**

Northrop will build center fuselages, centerline pylons, aft fuselages, and vertical tails for the F-18. Manufacture of these sections will be at Northrop's Hawthorne facility. NOC will plan and manufacture or procure all hardware and equipment contained within these sections of the F-18 except engines, landing gear, arresting hook, and electrical power generation system. The center fuselage section (excluding landing gear), and aft fuselage section with vertical tails will be assembled and checked out as integrated packages complete with functional systems and equipment to the extent that it is economical. The center section and aft section will be joined and spliced at the manufacturing break and delivered to MDC in this configuration less engines and high value CFE. The centerline pylons will be shipped separately as interchangeable items.

NOC will perform sustaining engineering in connection with those articles designed by NOC during the FSD Program.

**ATTACHMENT 4
TO NOC/MDC AGREEMENT
PRODUCTION PROGRAM
MDC TASKS**

MDC will build or procure the forward fuselage, horizontal tail, wing, landing gear, avionics and all other hardware and equipment contained within these sections, and perform final assembly and checkout of the F-18.

All manufacturing or procurement responsibility not specifically described as NOC responsibility in Attachment 3, or as MDC responsibility above, shall be MDC responsibility.

**THE AGREEMENT BETWEEN McDONNELL
AND NORTHROP DATED AUG. 26, 1976**

AGREEMENT

THIS AGREEMENT entered into this 26th day of August 1976 between McDonnell Douglas Corporation ("MDC") and Northrop Corporation ("NOC") is made with reference to the following:

RECITALS

A. On 27 June 1975 MDC and NOC entered into an agreement (hereinafter referred to as the "Basic Agreement") governing their business relationship relative to programs involving derivatives of NOC's YF-17 aircraft.

B. Pursuant to Paragraph 3(b) of the Basic Agreement, NOC has elected to design, develop and produce for sale to the United States and to foreign governments all aircraft designed only for land-based operations which are derived from the YF-17, which aircraft may incorporate such features and equipment designed, developed and/or produced under or in connection with MDC's prime contract with the U.S. Navy for

the F-18 family of aircraft as NOC deems appropriate. Such aircraft are hereinafter referred to as the "LBF-18". The currently defined configurations of the LBF-18 are described in Northrop Document NB 75-301R, Weapon System Description, dated July 1976.

C. The foregoing election by NOC is not in derogation of MDC's rights under the Basic Agreement and in particular MDC's rights shall remain as set forth in Paragraph 3(a) of the Basic Agreement.

D. MDC desires to participate as a subcontractor in the programs contemplated in Recital B.

NOW, THEREFORE, the parties hereto agree as follows:

1. Participation by MDC.

(a) The parties on or before 1 December 1976 will mutually establish not-to-exceed prices for the work set forth in Attachment I hereto as well as schedules and such other terms and conditions as are then deemed necessary by NOC to support its planned proposals and commitments. Failure to agree by 1 December 1976 on the foregoing matters shall not invalidate this Agreement.

(b) MDC will participate as a subcontractor on the LBF-18 program on condition that the U.S. Government, pursuant to laws and regulations then in effect, does not specifically direct procurement of such work from some source other than MDC. Both parties agree to exert their best efforts to avoid any such direction.

(c) MDC will contract with NOC on a fixed price type basis utilizing the pricing methodology set forth in Attachment II hereto.

(d) Both parties covenant to act reasonably in this regard and commit to use their best efforts to achieve agreement on the foregoing matters.

2. Relationship To Basic Agreement.

This Agreement together with the Basic Agreement sets forth the parties' understandings regarding the programs contemplated hereby. Except as may otherwise be provided herein, no rights, duties or obligations under the Basic Agreement are in any manner superseded or altered hereby.

3. Applicable Law.

This agreement and the rights and duties of the parties hereunder shall in all respects be governed by and construed according to the laws of the State of California.

McDONNELL DOUGLAS
CORPORATION

NORTHROP
CORPORATION

By: /s/ S. N. McDonnell

By: /s/ Thomas Jones

ATTACHMENT I

The following effort will be performed by MDC, all under NOC's direction and in accordance with system definition and performance to be established by NOC:

1. Design, develop and fabricate the LBF-18 wing and LEX.
2. Manufacture and/or procure the following LBF-18 airframe components, ancillary hardware and optional components:

Airframe Components. Horizontal stabilator, forward fuselage side panels, canopy and windshield assembly, forward nose assembly, gun door and canopy fairing.

Ancillary Hardware. Three sets of wing stores pylons (B.L. 88, 134.28 and 170) and two 600 gallon external tanks per aircraft or in quantities specified by the purchaser.

Optional Components. In-flight refueling system and integral wing fuel plumbing when so specified by the customer.

3. Procure the following contractor-furnished equipment for the LFB-18: air data computer; mission computer; inertial navigation unit; digital fuel quantity set; interference blanker; vertical ejector rack VER-2; M-61 gun drive and feed system; 14-30 bomb racks; horizontal stabilator and rudder actuators and optional radar altimeter. The procurement of the foregoing items by MDC is subject to such items remaining substantially common to the LBF-18 and the F-18 aircraft being procured by the U.S. Navy for its own use. If NOC elects to incorporate in the LBF-18 a new item (as opposed to the same item or a modification thereof) NOC may procure that new item directly from the source thereof.
4. For those LBF-18 equipped with avionics (including radar) and cockpit hardware essentially identical to the aircraft being procured by the U.S. Navy for its own use, MDC will provide the entire forward fuselage structure fully assembled complete with all installations except the nose gear and gear doors.
5. Provide Ground Support Equipment, spares and training equipment associated with items furnished by MDC.
6. MDC will provide transportation and handling, reliability, maintainability, system safety services, plans and data responsive to NOC integrated logistics management, ground support equipment and technical data in connection with items furnished by MDC and provide technical and logistics support of NOC flight testing.

ATTACHMENT II

I. Not-To-Exceed Prices

All not-to-exceed prices will be stated in NOC defined constant year 1975 dollars and will be subject to adjustment (either up or down) for the following:

- (a) Any deviation of the production rate/schedule for the LBF-18 and/or the U.S. Navy F-18A/B from the annual planned production increments.

- (b) Inflation of labor, material and overhead costs (including only those elements subject to inflation) from 1975 dollars by means of an economic adjustment clause.
- (c) Changes to NOC specifications that affect commonality between the LBF-18 and F-18A/B.

II. Definitized Prices - Methodology

MDC's not-to-exceed prices will be superseded by fixed price type arrangements for nonrecurring preproduction development and for each annual incremental quantity of LBF-18 arrived at in the following manner:

- (a) Nonrecurring preproduction development effort will be costed on the same basis as the F-18A/B, adjusted to take into consideration the benefits derived from prior F-18A/B development effort and configuration differences.
- (b) Recurring aircraft parts identical to the F-18A/B shall be costed on the same basis as the F-18A/B parts, adjusted for each annual procurement to take into consideration the total LBF-18 and F-18A/B quantities. The cost applicable to the items furnished by MDC to NOC will be developed utilizing the same methodology used to develop U.S. Navy negotiated cost for concurrently produced F-18A/B aircraft.
- (c) Where an item is partly common to the F-18A/B or totally peculiar to the LBF-18, the cost for such items shall be established using the same labor rates, burdens and related factors as utilized with the U.S. Navy for the F-18A/B recognizing any benefits which would result from concurrent production with with [sic] F-18A/B.
- (d) A negotiated profit of not less than 10% of negotiated cost and not more than 15% of negotiated cost.

III. Pricing Data

Proposals for not-to-exceed prices and definitized prices must be submitted on DD Form 633 and accompanied by such supporting historical and projected cost data as would be submitted to the U.S. Government in order to perform cost/price analysis.

IV. Audit

All prices and supporting cost detail are subject to U.S. Government audit. MDC will authorize release to NOC of audit reports compiled by governmental audit agencies verifying any of the foregoing.

**AMENDMENT TO AGREEMENT
BETWEEN****MCDONNELL DOUGLAS CORPORATION (MDC)****AND****NORTHROP CORPORATION (NOC)**

MDC and NOC hereby amend their agreement of 27 June 1975 by adding the following new subparagraph (g) to Paragraph 5 thereof:

"(g) Notwithstanding anything to the contrary herein, those tasks being performed by NOC at the end of the initial 800 aircraft program will continue to be performed by NOC thereafter."

Executed this 28th day of August 1976.

**MCDONNELL DOUGLAS
CORPORATION**

**NORTHROP
CORPORATION**

By: /s/ S. N. McDonnell

By: /s/ Thomas Jones

NORTHROP'S AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL NO. 79-04145-R

NORTHROP CORPORATION,

Plaintiff,

v.

MCDONNELL DOUGLAS CORPORATION,

Defendant.

**FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF AND DAMAGES**

Plaintiff NORTHROP CORPORATION ("Northrop")
alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331, 1332(a)(1) and (c), 1337 and 15 U.S.C. §§ 15, 25 and 26. Venue of this action lies in the Central District of California by virtue of 28 U.S.C. § 1391(a) and (c) and 15 U.S.C. § 22. The matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between citizens of different States. Plaintiff Northrop resides in, and defendant McDONNELL DOUGLAS CORPORATION ("MDC") is doing business in, the Central District of California.

THE PARTIES

2. Plaintiff Northrop is a corporation incorporated under the laws of the State of California, having its principal place of business at 1800 Century Park East, Los Angeles, California 90067. Plaintiff is engaged, *inter alia*, in the design, development and production of military aircraft.

3. Defendant MDC is a corporation incorporated under the laws of the State of Maryland, having its principal place of business in St. Louis County, Missouri. Defendant is engaged in the design, development and production of various aerospace products, including commercial and military aircraft.

FIRST CAUSE OF ACTION

4. By this cause of action Northrop seeks injunctive relief against MDC to prevent certain actions by which MDC would misappropriate Northrop's property by breaching the June 27, 1975 contract (the "Basic Agreement") pursuant to which MDC was licensed to use Northrop's proprietary data and technology for the purpose of teaming with Northrop to produce certain derivatives of Northrop's YF-17 aircraft to satisfy the requirements of the United States Navy (the "Navy" or the "U.S. Navy"). The actions contemplated by MDC, as hereinafter set forth, both substantially exceed its license under the Basic Agreement and threaten severe, permanent and irreparable injury to Northrop which cannot be compensated for by way of monetary damages.

THE EVOLUTION OF NORTHROP'S YF-17 FAMILY OF AIRCRAFT

5. In or around 1965 Northrop initiated an effort to develop a new, lightweight fighter aircraft for sale both to the United States and in the international marketplace. Northrop expended in excess of \$25 million in support of this developmental effort.

6. By 1969 the developmental effort described in paragraph 5, *supra*, had yielded a new design for fighter aircraft denominated the "P-530," on which Northrop holds a design patent, and related data and know-how proprietary to Northrop.

7. During the course of Northrop's developmental effort on the P-530, the United States Air Force (the "Air Force") issued a Request for Proposals to conduct a prototype develop-

ment program for a lightweight fighter aircraft. This prototype program, which was intended to produce a low cost, high performance aircraft for land-based applications, was eventually denominated by the Air Force as the Air Combat Fighter, or "ACF," Program.

8. Northrop submitted a proposal to the Air Force based upon its P-530 design and in 1972 was awarded a contract for the development of a prototype ACF aircraft, the "YF-17." A second prototype contract was awarded by the Air Force to GENERAL DYNAMICS CORPORATION ("General Dynamics") for its proposed "YF-16." MDC did not participate in the competition for these prototype contracts.

9. The P-530 and the YF-17 were designed solely for land-based use. Following the development of the P-530, and independent of its prototype contract for the YF-17, Northrop developed a second derivative of the P-530 that would be suitable for naval operations (carrier-suitable aircraft). The carrier-suitable derivative of the P-530 that resulted from this effort was denominated by Northrop as the "P-630."

10. Contemporaneous with Northrop's development of the YF-17 and the P-630, the Navy in 1973 was evaluating the possible procurement of a new lighter weight carrier-suitable aircraft, designated as the "VFAX."

11. Funding of the VFAX (which was redesignated as the "Navy Air Combat Fighter" or "NACF") was conditioned by the Congress upon the ability of the Navy to make maximum use of the Air Force ACF Program data, technology and hardware. As a result of this Congressional directive, derivatives of only two aircraft were eligible for participation in the NACF competition, *i.e.*, Northrop's YF-17 and the YF-16 developed by General Dynamics.

12. In 1974 the Navy issued a solicitation for the development of the NACF. As a result of the Congressional mandate referred to in paragraph 11, *supra*, this solicitation was limited to derivatives of Northrop's YF-17 and General Dynamics' YF-16.

13. Because neither General Dynamics nor Northrop had previously produced carrier-suitable aircraft, the Navy asked each of them to develop a partnership agreement with some prior producer of carrier-suitable aircraft for the NACF procurement.

14. Thereafter, Northrop received an inquiry from MDC expressing its interest in teaming with Northrop in accordance with the Navy request. Following this inquiry, the parties entered into negotiations concerning such an arrangement, and on October 2, 1974 executed a "Teaming Agreement." MDC would not have been able, but for Northrop's agreement to team with it, to participate in the NACF competition.

15. Under the Teaming Agreement the parties agreed "to team for the purpose of developing, proposing and producing a USAF derivative of the YF-17 (USAF ACF) and a carrier-suitable version of the YF-17 (USN ACF) to satisfy U.S. Navy VFAX requirements." The Teaming Agreement provided that MDC would serve as prime contractor on the NACF, with Northrop as associate contractor.

16. In furtherance of the underlying Congressional direction, as described in paragraph 11, *supra*, the Teaming Agreement provided that Northrop would disclose and furnish its proprietary design and test data and know-how to MDC for use by it in competing for contracts to be awarded by the Navy for the design, development and production of the NACF. The Teaming Agreement further required Northrop to provide to MDC such design review participation and on-site technical liaison as might be necessary to facilitate the successful competition by the Northrop-MDC team for contracts for the NACF.

17. Pursuant to the Teaming Agreement, Northrop transferred to MDC all of Northrop's proprietary data and know-how relating to the P-530, the P-630 and the YF-17. In addition to this proprietary data, Northrop provided MDC with all of the technical know-how necessary for MDC fully to utilize Northrop's proprietary data. It was because of the confidential

business relationship created by the Teaming Agreement that Northrop was willing to disclose and did disclose to MDC Northrop's secret proprietary technology. Without this proprietary data and know-how furnished to it by Northrop, MDC could not have submitted a proposal responsive to the NACF requirement.

18. Northrop's contribution to the team's efforts under the NACF competition was recognized by MDC in the submission of the team's NACF proposal to the Navy, which described the parties' respective contributions to the Northrop-MDC team as follows:

"The McDonnell Aircraft Company (MCAIR) NACF, to be developed in cooperation with Northrop Corporation, combines MCAIR's Navy background and its up-to-date experience in multimission aircraft *with the YF-17 flying hardware and technology of Northrop.*" (Emphasis added.)

MDC further advised the Navy, in submitting the team's NACF proposal, that Northrop's "work on the YF-17 has enabled us to offer reductions totaling \$23,000,000 in our proposal. . . ."

19. On May 2, 1975, the Navy announced the selection of the derivative of Northrop's YF-17 proposed by the Northrop-MDC team as the winning submission in the NACF competition. In connection with that announcement, the Navy redesignated the NACF the "F-18."

THE BASIC AGREEMENT ALLOWING MDC TO USE NORTHROP'S PROPERTY

20. Under date of June 27, 1975, Northrop and MDC entered into a license agreement relative to the F-18 (the "Basic Agreement") which superseded the Teaming Agreement. Pursuant to the Basic Agreement, the parties defined the F-18 as "a carrier-based derivative of NOC's [Northrop's] YF-17 aircraft redesigned by NOC and MDC to satisfy the U.S. Navy's VFAX requirement."

21. Pursuant to Paragraph 4(b) of the Basic Agreement, Northrop agreed to continue to furnish to MDC certain of Northrop's proprietary aircraft data and to provide MDC with continuing technical liaison at MDC's plant. The parties specifically agreed that MDC's use of the proprietary data transferred to it by Northrop would be limited to those contracts identified in paragraph 3(a) of the Basic Agreement. Pursuant to Paragraph 10 of the Basic Agreement, the parties further agreed that the data exchanged between them would continue to be accorded confidential treatment by the receiving party, as follows:

"The parties hereafter in due course will enter into a proprietary data agreement covering the handling and treatment of data exchanged between them in furtherance of the programs or contracts undertaken by either of them as contemplated by this Agreement. In the interim, all such data as exchanged may be used by the parties as required hereunder and the parties shall exercise reasonable diligence in safeguarding all such data from disclosure to third parties."

22. Paragraph 3(a) of the Basic Agreement sets forth the parties' agreement concerning those contracts for derivatives of Northrop's YF-17 with respect to which MDC would be licensed to serve as prime contractor and in furtherance of which it could use Northrop's proprietary technology. Paragraph 3(a) stated as follows:

"The parties hereby agree that MDC will be prime contractor in connection with contracts with the U.S. Navy for the development of the F-18 and for the production of those F-18 aircraft purchased by the U.S. Navy for its own use. Furthermore, in the event a foreign customer desires to procure from MDC (either directly, or indirectly through the U.S. Navy) F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for the latter's present or future use (for example, configuration and equipment changes to achieve a reconnaissance capability for a potential customer would still be considered 'basically the same' configuration), MDC will be prime contractor in connection with contracts for any such sale."

23. Paragraph 3(b) of the Basic Agreement reserved to Northrop the right to serve as prime contractor for all derivatives of its YF-17 other than those which MDC had been licensed to produce pursuant to paragraph 3(a):

"NOC [Northrop] may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the NOC [Northrop] YF-17 other than those referred to in paragraph [3](a) above."

24. An essential term governing MDC's license to use Northrop's proprietary technology was MDC's obligation, as set forth in Paragraph 5(b) of the Basic Agreement, to place with Northrop, for performance by Northrop either directly or through sources selected by and responsible to Northrop, subcontracts for 30% of the developmental work under prime contracts awarded to MDC in accordance with Paragraph 3(a) of the Basic Agreement and, with respect to production of the aircraft to be delivered under such prime contracts, subcontracts for certain segments of the aircraft totalling "approximately 40% of the cumulative average direct labor hours per aircraft. . . ." Paragraph 5(f) specifically states in this regard that:

"In the event MDC is awarded any of the contracts contemplated by [P]aragraph 3(a) hereof, *MDC shall award contracts* to NOC [Northrop] for the performance of the foregoing work except and to the extent the U.S. Navy, pursuant to laws and regulations then in effect, specifically directs procurement thereof in some other manner." (Emphasis added.)

25. Pursuant to Paragraph 5(b) of the Basic Agreement and Attachment 3 thereto, Northrop's participation in any of the prime contracts referred to in paragraph 3(a) of the Basic Agreement is to include, *inter alia*, the manufacture of the center and aft fuselages, including as elements thereof the "Center Fuselage Forward Barrel" and "Center Fuselage Inlet Ducts."

26. After the Navy's award of the F-18 prime contract to MDC (based upon the selection of the Northrop-MDC team

described in paragraph 19 above), MDC in turn entered into a corresponding subcontract (the "Navy subcontract") committing to Northrop 30% of the full scale development work and requiring MDC to order from Northrop 40% of any Navy orders for production F-18 aircraft. Northrop's subcontract work included, *inter alia*, the center and aft fuselages.

27. The Navy subcontract explicitly committed MDC as follows:

"(a) It is agreed that to the extent that the Government elects to purchase from MDC, whether by option exercise under the prime contract or otherwise, additional quantities of the items called for under the prime contract Schedule, MDC shall purchase from Northrop corresponding additional quantities of the items called for under this subcontract, except and to the extent the U.S. Navy, pursuant to laws and regulations then in effect specifically directs procurement thereof in some other manner. The parties agree, however, to exert their best efforts to avoid any such direction by the U.S. Navy and to see that the work contemplated by this clause is performed by Northrop."

The Navy subcontract further explicitly provided:

"IT IS AGREED BETWEEN MDC AND NORTHROP THAT THE ITEMS ORDERED HEREUNDER FALL WITHIN THE DEFINITION OF /UNIQUE GOODS/ AS FOUND WITHIN SECTION 2.716 OF THE UNIFORM COMMERCIAL CODE."

28. These MDC obligations under the Navy subcontract, (referred to in paragraphs 26 and 27,) were in accordance with and pursuant to Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement. MDC's implementation of these obligations in the Navy subcontract manifested its contemporaneous interpretation of Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement.

**THE CANADIAN PROCUREMENT AND MDC'S MISUSE OF
NORTHROP'S PROPERTY AND ITS ABUSES OF THE
LICENSE CREATED UNDER ITS AGREEMENTS WITH
NORTHROP**

29. One of the contractual opportunities for derivatives of Northrop's YF-17 with respect to which MDC would, pursuant to Paragraph 3(a) of the Basic Agreement, be licensed to use Northrop's proprietary technology and serve as prime contractor is the contract that is the subject of a procurement currently being conducted by the Government of Canada (the "Canadian procurement"), in connection with which, on information and belief, MDC has offered to sell to the Government of Canada a quantity of carrier-suitable F-18 aircraft of basically the same configuration as those currently under production for the Navy. The F-18 aircraft currently under production for the Navy are denominated the "F/A-18A."

30. Except for Northrop's furnishing to MDC of its proprietary design, test data, know-how and on-site technical liaison under the terms of the Teaming Agreement and the Basic Agreement, MDC would not be able to offer F/A-18A aircraft to the Government of Canada. But for Northrop's license, this business opportunity would not be available to MDC.

31. MDC is seeking to obtain the Canadian contract by promising to subcontract to Canadian industry, *inter alia*, the following:

(a) Substantial portions of the work under the potential Canadian F/A-18A order to which Northrop is entitled under Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement (including the center and aft fuselage);

(b) Substantial portions of the work under the Navy F/A-18A program to which Northrop is entitled under Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and which MDC is specifically required to place with Northrop under the Navy subcontract; and

(c) Substantial portions of the work under future sales of F-18 aircraft to other foreign customers to which Northrop is entitled under Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement.

32. MDC has advised Northrop that MDC has delivered an executed offer to the Government of Canada for the Canadian F-18 contract, which offer includes an express commitment by MDC to place certain work with Canadian industry. This commitment includes specific work in connection with the center and aft fuselage. Further, this commitment far exceeds work related to the Canadian F-18 and includes those aircraft to be delivered to the Navy and to other potential customers.

33. MDC has made these offers to divert Northrop work unilaterally and without consultation with Northrop, despite Northrop's express objections. MDC has rejected Northrop's offers to consult and cooperate with respect to the Canadian offering and asserted its right to act unilaterally with respect to Northrop's participation in the potential Canadian business, other foreign sales and the existing Navy program. Further, MDC has failed and refused to advise the Government of Canada of Northrop's objections and MDC has stated to Northrop that it will not communicate such advice.

34. In furtherance of the commitment to the Government of Canada, MDC has already solicited four (4) separate proposals from Canadian companies for Northrop work.

35. MDC is thus seeking to seize a business opportunity which the Basic Agreement made available to it, by sacrificing Northrop's rightful participation in potential Canadian and other foreign sales and actual Navy business, thus misusing Northrop's property and abusing its license under the Basic Agreement.

36. Unless MDC is restrained from these actions, the Government of Canada may contract with MDC on the basis of its improper offers, thereby establishing a sovereign claim that will reward MDC's misappropriation of Northrop's property

by making the fulfillment of the improper offers political and diplomatic issues and impeding the possibility of resolution of such issues through judicial processes.

37. Northrop has no adequate remedy at law. Unless MDC is restrained from such actions, MDC will misappropriate, compromise and misuse Northrop's unique and proprietary fighter aircraft design, data and know-how and deprive Northrop of business derived from its unique property, upon which Northrop has planned its future.

SECOND CAUSE OF ACTION

38. By this cause of action Northrop also seeks injunctive relief against MDC to prevent it from misappropriating Northrop property by abusing and exceeding the license granted to it by Northrop in the Basic Agreement and to avoid the severe, permanent and irreparable injury which Northrop will otherwise suffer as a result of the unauthorized actions by MDC.

39. Paragraphs 1 through 28 of this Complaint are incorporated by reference as though fully set forth herein.

THE ISRAELI PROCUREMENT AND MDC'S MISUSE OF NORTHROP'S PROPERTY AND ITS ABUSES OF THE LICENSE CREATED UNDER THE BASIC AGREEMENT

40. Another contractual opportunity for derivatives of Northrop's YF-17 with respect to which MDC would be licensed to use Northrop's property and serve as prime contractor—assuming it offers a carrier-suitable F-18 aircraft of basically the same configuration as those currently under production for the Navy—is a contract being solicited by the Government of Israel.

41. Pursuant to Paragraph 3(b) of the Basic Agreement, Northrop seeks to become the prime contractor for the Israeli sale, by offering its land-based derivative of the YF-17, known as the F-18L. Northrop's offering is also made pursuant to so-called Master Plans for international F-18 sales approved by the United States Navy on August 28, 1976.

42. MDC also seeks to become prime contractor for the Israeli sale. Except for Northrop's furnishing to MDC of its proprietary design, test data, know-how and on-site technical liaison under the terms of the Teaming Agreement and the Basic Agreement, MDC would not be able to offer F-18 aircraft to the Government of Israel. Paragraph 3(a) of the Basic Agreement permits MDC to serve as prime contractor on sales to foreign governments of "F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for the latter's present or future use." But for Northrop's license, this business opportunity would not be available to MDC.

43. MDC is seeking to seize this business opportunity not by means consistent with the Basic Agreement, but by actions in contravention of the agreement and in excess of the license it grants. MDC's threatened actions also contravene the Master Plans approved by the Navy on August 28, 1976. For example:

(a) MDC is offering the Government of Israel an F-18 which is neither carrier-suitable nor basically the same configuration as the Navy F/A-18A. To accommodate Israel's requirements for a lighter, more maneuverable land-based fighter, MDC is offering to modify the Navy F/A-18A by, *inter alia*, major structural changes, reducing the weight, and the addition of large external tanks; and

(b) MDC is offering to subcontract to or co-produce with Israeli industry work to which Northrop is entitled under the explicit provisions of Paragraph 5(b) and 5(f) and Attachment 3 of the Basic Agreement (including specifically center fuselage componentry).

44. The nature of MDC's improper offerings is disclosed by its recent submittal to a United States Department of Defense *ad hoc* evaluation team in which the significant differences between the Navy F/A-18A and the Israeli F-18 (or "IAF-F-18A") proposed by MDC were described and in which "Israeli industry assembly tasks" were identified (*e.g.*, "An Israeli company, under license from MCAIR, will assemble a major section of the Israeli F-18A, such as the center fuselage. . . .")

45. MDC has made these offers, or threatens to do so, unilaterally and without consultation with or the consent of Northrop.

46. MDC is thus seeking unilaterally and wrongfully to extend its license to use Northrop's property beyond the limitations explicitly stated in Paragraph 3(a) of the Basic Agreement and to oust Northrop of the prime contractor role reserved to it under Paragraph 3(b) of the Basic Agreement. MDC is thus also seeking unilaterally and wrongfully to seize the Israeli business opportunity by utilizing Northrop's property but at the same time sacrificing Northrop's rightful participation in potential Israeli contracts for YF-17 derivatives, thus breaching the Basic Agreement and abusing its license.

47. Unless MDC is restrained from these actions, the Government of Israel may accept its improper offers, thereby establishing a sovereign claim that will reward MDC's misappropriation of Northrop's property by making the fulfillment of the improper offers political and diplomatic matters, and impeding the possibility of resolution of such issues through judicial processes.

48. Northrop has no adequate remedy at law. Unless MDC is restrained from such actions, MDC will misappropriate, compromise and misuse Northrop's unique and proprietary fighter aircraft design, data and know-how and deprive Northrop of business derived from its unique property upon which Northrop has planned its future.

THIRD CAUSE OF ACTION

49. By this Third Cause of Action, Northrop seeks, pursuant to 28 U.S.C. §§ 2201 and 2202, a declaration of the rights of the parties under the June 27, 1975 Basic Agreement pursuant to which MDC was afforded a limited license to use Northrop's proprietary data and technology for the purpose of teaming with Northrop to produce certain derivatives of Northrop's YF-17 aircraft.

50. Paragraphs 1 through 48 of this Complaint are incorporated by reference as though fully set forth herein.

51. Under the Basic Agreement, with respect to the F-18 aircraft and any other derivatives of Northrop's YF-17, MDC is entitled to serve as prime contractor only in connection with:

(a) Contracts with the Navy for the development and production of carrier-suitable F-18 aircraft purchased by the Navy for its own use or for resale by it to foreign customers; and

(b) Contracts for the sale (either directly, or indirectly, through the Navy) to any foreign customer of F-18 aircraft which are both carrier-suitable and of basically the same configuration as those purchased by the Navy for its own use.

52. Under the Basic Agreement, with respect to the F-18 and any other derivatives of Northrop's YF-17, MDC is not entitled to serve as prime contractor in connection with any contracts for development, production or sale other than those described in paragraph 51, *supra*; and, in particular, MDC is not entitled to serve as prime contractor in connection with sales of any F-18 aircraft to the Air Force, and is not entitled to serve as prime contractor in connection with sales to foreign customers of any F-18 aircraft that either deviate in configuration or structure from the F-18 being purchased by the Navy for its own use or are noncarrier-suitable.

53. Under the Basic Agreement, where MDC serves as a prime contractor pursuant to its limited rights under Paragraph 3(a), MDC is required by Paragraphs 5(b) and 5(f) and Attachment 3 to award to Northrop contracts for "approximately 40% of the cumulative average direct labor hours per aircraft," including specifically the manufacture of the center and aft fuselages.

54. In contravention of Northrop's position as set forth in paragraphs 51, 52 and 53, *supra*:

(a) MDC has taken the position that under the Basic Agreement MDC is entitled to be prime contractor in connec-

tion with a contract with the Air Force for the development, production and/or sale of F-18 aircraft; and

(b) MDC is attempting to sell to certain foreign governments F-18 aircraft that deviate in configuration and structure from the F/A-18A being purchased by the Navy for its own use, which deviations could render the resulting aircraft noncarrier-suitable; as manifested by its conduct, MDC has taken the position that under the Basic Agreement MDC is entitled to be prime contractor in connection with sales to foreign customers of F-18 aircraft that deviate in configuration or structure from the F/A-18A being purchased by the Navy for its own use and could render the resulting aircraft noncarrier-suitable.

(c) MDC has asserted that, where it is or seeks to be prime contractor on a YF-17 derivative sale, it may unilaterally deny Northrop work assured to it by Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement; MDC is attempting to implement this wrongful position through proposals and presentations to governmental third parties.

55. A judicial determination of the controversy between the parties and declaration as to their rights under the Basic Agreement are necessary and appropriate to enable and require proper action in connection with various procurement programs which are currently being considered by the Air Force and a number of foreign governments relating to aircraft encompassed by the Basic Agreement, and to enable potential customers of such aircraft to make their program decisions free of conflicting claims between the parties as to their respective rights to produce aircraft derived from Northrop's YF-17.

FOURTH CAUSE OF ACTION

56. By this Fourth Cause of Action, Northrop seeks damages for fraud on the part of MDC in the inducement of the Teaming Agreement and the Basic Agreement.

57. Paragraphs 1 through 56 of this Complaint are incorporated by reference as though fully set forth herein.

58. On or about October 2, 1974, and at times prior thereto, Northrop and MDC were negotiating concerning the formation of an arrangement pursuant to which, *inter alia*, Northrop would furnish to MDC all of Northrop's proprietary data and know-how relating to Northrop's P-530, P-630 and YF-17 aircraft so as to enable MDC to participate with Northrop in a joint undertaking to satisfy the Navy's VFAX requirements with a carrier-suitable derivative of Northrop's YF-17.

59. In the course of the negotiations described in paragraph 58, *supra*, MDC falsely and fraudulently represented to Northrop (a) that MDC would accept and use Northrop's proprietary technology for the limited purpose of developing and producing with Northrop a carrier-suitable derivative of Northrop's YF-17, i.e., the NACF and (b) that MDC would not use Northrop's proprietary technology to develop, produce or sell a noncarrier-suitable derivative thereof. MDC made similar false and fraudulent representations on or about June 27, 1975 in the negotiation of the Basic Agreement, pursuant to which MDC secured Northrop's promise to continue to furnish to MDC technology proprietary to Northrop concerning the YF-17 and related aircraft.

60. The representations made by MDC concerning its use of Northrop's technology were false and fraudulent, and in truth and fact MDC intended to use Northrop's proprietary technology to establish itself as prime contractor to the Navy for the NACF and to utilize its position as prime contractor to induce other agencies of the United States and foreign customers to purchase from MDC as prime contractor all derivatives, versions and variants of the Navy aircraft, whether carrier-suitable or noncarrier-suitable.

61. The representations described in paragraph 59, *supra*, were known by MDC to be false when made and were made with the intent to deceive Northrop and to induce Northrop to disclose its proprietary technology to MDC.

62. At the time the representations described in paragraph 59, *supra*, were made by MDC, Northrop believed them to be

true, and in reliance thereon Northrop was induced to enter into the Teaming Agreement and the Basic Agreement and to disclose to MDC Northrop's proprietary technology.

63. Following the execution of the Basic Agreement and for an extended period thereafter MDC continued falsely and fraudulently to represent to Northrop that MDC would not use Northrop's proprietary technology to attempt to develop, produce or sell a noncarrier-suitable derivative of the NACF. Such representations were made by MDC, *inter alia*, during the negotiation of an agreement between the parties dated August 26, 1976 and in the Master Plan submitted by MDC to Northrop for its concurrence and in turn to the Navy to secure its approval for sales of the F/A-18A and F-18L to foreign customers.

64. The representations made by MDC as described in paragraph 63, *supra*, were false and fraudulent, and in truth and fact MDC intended to utilize its position as prime contractor to the Navy to induce other agencies of the United States and foreign customers to purchase from MDC as prime contractor all derivatives, versions and variants of the F/A-18A, whether carrier-suitable or noncarrier-suitable.

65. The representations described in paragraph 63, *supra*, were known by MDC to be false when made and were made with the intent to deceive Northrop and to induce Northrop to continue to comply with the terms of the Basic Agreement and to forbear in asserting its rights under the Basic Agreement until MDC had entered into production of the F/A-18A for the Navy and achieved production efficiencies that would preclude meaningful competition from Northrop for contracts for the production of F/A-18A aircraft.

66. At the time the representations described in paragraph 63, *supra*, were made by MDC, Northrop believed them to be true, and in reliance thereon Northrop was induced to continue to comply with the terms of the Basic Agreement and to forbear in asserting its rights thereunder.

67. By reason of the facts set forth above, Northrop has been damaged in an amount in excess of \$100,000,000.

FIFTH CAUSE OF ACTION

68. By this Fifth Cause of Action, Northrop seeks damages and an accounting for profits earned by MDC as a result of its fraudulent acquisition of Northrop's proprietary technology and breach of trust.

69. Paragraphs 1 through 67 of this Complaint are incorporated by reference as though fully set forth herein.

70. The facts and circumstances attendant to the negotiation of the Teaming Agreement and the Basic Agreement, as well as the terms of those agreements, established a confidential relationship between Northrop and MDC with respect to the use and handling by MDC of the proprietary technology disclosed to it by Northrop.

71. At all times material and relevant herein, Northrop reposed the utmost trust and confidence in MDC as its partner under the NACF procurement and in MDC's representations concerning the limited use to which Northrop's proprietary technology would be put by MDC. By reason of this confidence and in reliance upon those representations, Northrop disclosed its proprietary technology to MDC and assisted MDC in the use of that technology to obtain a prime contract from the Navy for the development and production of the NACF.

72. MDC made the representations described in paragraph 59, *supra*, knowing them to be false, having made them for the purpose of defrauding Northrop and inducing it to disclose its proprietary technology to MDC.

73. As a result of Northrop's disclosure of its proprietary technology to MDC, MDC was able to establish itself as prime contractor to the Navy and to foreign customers for the NACF, and to develop and sell the NACF, or F/A-18A, in significant quantities. It is anticipated that additional such sales will be made, and that F/A-18A aircraft derived from

Northrop's proprietary technology will continue to be sold for a period in excess of twenty years.

74. Absent Northrop's proprietary technology, which MDC fraudulently induced Northrop to disclose to it in confidence, MDC could neither (a) have established itself as prime contractor to the Navy for the F/A-18A, (b) made the significant sales of F/A-18A aircraft for which contracts are already in existence, nor (c) have established itself as a viable source for additional future sales of F/A-18A aircraft.

75. On information and belief, MDC has earned and will continue to earn significant profits under the contracts referred to in paragraph 74, *supra*.

76. Because its acquisition of and license to use Northrop's proprietary technology were based upon the false and fraudulent representations referred to in paragraph 59, *supra*, MDC's use of that technology was undertaken by it as trustee for Northrop and retention by MDC of the profits earned under contracts for F/A-18A aircraft would unjustly enrich MDC.

77. MDC is attempting to sell to agencies of the United States other than the Navy and to foreign customers derivatives, versions and variants of the F/A-18A that are neither carrier-suitable nor of basically the same configuration as the F/A-18A. Such sales efforts on the part of MDC constitute a breach of trust and an abuse of the confidential relationship between the parties.

78. Because its attempts to sell derivatives, versions and variants of the F/A-18A constitute a breach of trust and an abuse of a confidential relationship, such contracts were undertaken by MDC as trustee for Northrop and the retention by MDC of the profits earned under such contracts would unjustly enrich MDC.

SIXTH CAUSE OF ACTION

79. By this Sixth Cause of Action, Northrop seeks injunctive relief against threatened and continuing injuries to North-

rop's business and property caused by MDC's attempt to monopolize a relevant part of commerce in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and damages for such injuries as have already been sustained.

80. Paragraphs 1 through 78 of this Complaint are incorporated by reference as though fully set forth herein.

81. The design, development, and production of jet fighter aircraft involve the constant and continuous flow of parts, materials and products in, and affects the flow of, interstate and international commerce. The relevant part of commerce which MDC is seeking to monopolize is the market in the United States and the Free World for state-of-the-art jet fighter aircraft with multi-mission attack/fighter capability.

82. The F/A-18A and F-18L, as designated by the Navy, are the latest state-of-the-art, multi-mission jet fighter aircraft offered for sale in the United States and Free World. Unlike any other such jet fighter aircraft in the United States and the Free World, the F/A-18A and F-18L can perform their missions at supersonic speeds, in weather, in day or at night. In addition, the superior aerodynamic design developed by Northrop for the F/A-18A and the F-18L enable those aircraft to exhibit flying qualities that are unique among state-of-the-art fighter aircraft. Thus, the F/A-18A and the F-18L constitute a relevant submarket for the purposes of Section 2 of the Sherman Act, 15 U.S.C. § 2.

83. MDC is the only contractor to have been awarded a prime contract for the development of production of the F/A-18A. MDC's status as the sole supplier of F/A-18A aircraft and the production efficiencies achieved by it as a result of its prime contract with the Navy for the F/A-18A precludes meaningful competition with MDC for contracts to produce the F/A-18A.

84. The F/A-18A and F-18L compete with one another in the Free World market. To date, the F/A-18A and F-18L have competed, and are competing directly with each other, in procurements conducted by four foreign governments, *i.e.*, Canada, Spain, Australia and Israel.

85. Northrop's ability to continue to compete with MDC in the Free World market by offering the F-18L as an alternative to the F/A-18A is based upon (a) the 40% share in the active F/A-18A manufacturing base guaranteed to Northrop by the Basic Agreement, and (b) of the reservation by Northrop, under Paragraph 3(b) of the Basic Agreement, of the exclusive right to develop and sell land-based derivatives of its YF-17, such as the F-18L.

86. In the period from 1974 to the present, MDC has sought, willfully and unlawfully, to eliminate Northrop as a producer of F/A-18A and F-18L aircraft with the specific intent of monopolizing the market for state-of-the-art, multi-mission jet fighter aircraft and the submarket for F/A-18A and F-18L aircraft in violation of Section 2 of the Sherman Act.

87. Pursuant to its specific design and intent to monopolize, MDC has engaged in the following acts and practices, among others, during the relevant time period:

(a) As alleged above in the First, Second and Third Causes of Action, MDC is violating the Teaming Agreement and the Basic Agreement by seeking to: (i) deprive Northrop of its active manufacturing base in F/A-18A aircraft; (ii) obtain contracts from foreign customers for the production of F-18-type aircraft which are neither carrier-suitable nor of "basically the same configuration" as the carrier-suitable F/A-18A that MDC has contracted to sell to the Navy; and (iii) frustrate Northrop's effort to sell F-18L aircraft to foreign customers;

(b) As alleged above in the Fourth Cause of Action, MDC induced Northrop to enter into the Teaming Agreement and the Basic Agreement by falsely representing to Northrop that: (i) MDC would accept and use Northrop's proprietary data and know-how solely for the purpose of developing and producing a carrier-suitable derivative of Northrop's YF-17 aircraft; and (ii) MDC would not use Northrop's proprietary technology to attempt to develop, produce or sell a noncarrier-suitable derivative thereof. MDC thereafter fraudulently concealed its misrepresentations during the period that it utilized North-

rop's proprietary data to establish itself as the sole producer of F/A-18A aircraft and to achieve production efficiencies relative thereto that would preclude meaningful competition by Northrop for contracts for F/A-18A aircraft;

(c) As alleged above in the Fifth Cause of Action, MDC violated its confidential relationship with Northrop by utilizing Northrop's proprietary data in its effort to eliminate Northrop from the F/A-18A and F-18L markets;

(d) MDC has engaged in one or more acts of industrial espionage aimed at wrongfully misappropriating Northrop's proprietary F-18L data. One such act came to light on January 25, 1979 when Northrop security officers apprehended representatives of MDC in the act of trespassing upon restricted Northrop premises and photographing, without Northrop's consent, proprietary layouts developed by Northrop to reflect its current manufacturing plans for the F-18L;

(e) MDC has endeavored to build its own public image in the F/A-18A and F-18L market, at the expense of Northrop's image, by misrepresenting that the F/A-18A and variations thereon, are aircraft designed solely by MDC that bear no meaningful relationship to Northrop's YF-17 and are not derived therefrom; and

(f) MDC has engaged in acts of tortious commercial disparagement by misrepresenting to customers that Northrop will not be able to deliver to them F-18L aircraft.

88. MDC's (a) breaches of the Teaming Agreement and the Basic Agreement, (b) fraud in the inducement of the Teaming Agreement and the Basic Agreement and continuing fraud thereafter, (c) violation of its confidential relationship with Northrop, (d) industrial espionage, (3) misrepresentation about the correlative design role of Northrop and MDC with respect to F-18-type aircraft, and (f) tortious commercial disparagement of Northrop, all were undertaken by MDC with the specific intent to exclude Northrop from the market for F/A-18A and F-18L aircraft and thus to monopolize this relevant submarket in violation of Section 2 of the Sherman Act.

89. In performing and carrying out the acts described above, MDC has achieved a dangerous probability of establishing and maintaining monopoly power within the relevant markets and submarkets. If MDC succeeds in its attempt to exclude Northrop from pending procurements in which the F/A-18A and F-18L are competing, and thus prevents Northrop from establishing an active manufacturing base for these aircraft, it will have eliminated Northrop as a competitor in the relevant submarket and established and maintained monopoly power.

90. As a direct and proximate result of MDC's continuing attempts to monopolize the market for F/A-18A and F-18L aircraft, Northrop has been injured in its business and property and has sustained actual damages, the full extent of which cannot be presently calculated, but which are at least in the amount of \$100,000,000. Unless MDC is enjoined from further efforts to monopolize the market for F/A-18A and F-18L aircraft, Northrop will suffer further injury to its business and property.

SEVENTH CAUSE OF ACTION

91. By this Seventh Cause of Action, Northrop seeks injunctive relief against and damages for continuing injuries to Northrop's business and property caused by MDC's acts of unfair competition.

92. Paragraphs 1 through 91 of this Complaint are incorporated by reference as though fully set forth herein.

93. Among others, MDC's actions complained of in the Sixth Cause of Action of this Complaint constitute unfair and fraudulent business practices in violation of California Business and Professions Code §§ 16700 *et. seq.*, 17200 and 17500 *et. seq.*

94. Such actions, if allowed to go unabated or unrecompensed, will cause substantial injury to Northrop.

EIGHTH CAUSE OF ACTION

95. By this Eighth Cause of Action, Northrop seeks recovery in *quantum meruit* for materials and services rendered to MDC for which Northrop has not been compensated.

96. Paragraphs 1 through 94 of this Complaint are incorporated by reference as though fully set forth herein.

97. On or about October 2, 1974, and at various times continuing to the present, Northrop furnished to MDC all of Northrop's proprietary data and know-how relating to Northrop's P-530, P-630 and YF-17 aircraft so as to enable MDC to participate with Northrop in a joint undertaking to propose and build a carrier-suitable derivative of Northrop's YF-17.

98. The value of this proprietary technology disclosed to MDC is at least \$100,000,000.

99. MDC has benefited and been enriched by its receipt of Northrop's proprietary technology in that MDC was able to establish itself as prime contractor to the Navy and to foreign customers for the NACF, and to develop and sell the NACF, or F/A-18A, in significant quantities. It is anticipated that additional such sales will be made, and that F/A-18A aircraft derived from Northrop's proprietary technology will continue to be sold for a period in excess of twenty years.

100. Northrop has not been compensated by MDC for use of Northrop's proprietary technology, even though that technology has made it possible for MDC to earn profits under contracts for F/A-18A aircraft.

101. Retention by MDC of the value of Northrop's proprietary data without compensation therefor to Northrop would unjustly enrich MDC.

WHEREFORE, Northrop Corporation prays:

As to the First and Second Causes of Action:

1. That this Court restrain and permanently enjoin McDonnell Douglas Corporation and any and all of its direc-

tors, officers, employees, agents and all other persons and entities acting in concert with or participating with them from actions exceeding, misusing or otherwise abusing its license to use the property of Northrop Corporation transferred under the Teaming Agreement and the Basic Agreement, including but not limited to, any of the following actions without the express written consent of Northrop Corporation:

(a) Offering to sell to or produce for any foreign customer, or representing to such customers that it is authorized to sell or produce, F/A-18A aircraft or any other derivatives of Northrop's YF-17 that are not carrier-suitable and/or do not conform to the configuration and structure of the F-18 being purchased by the Navy for its own use;

(b) Offering to sell to or produce for any foreign customer, or representing to such customers that it is authorized to sell or produce, F/A-18A aircraft or any other derivatives of Northrop's YF-17 on terms that are not consistent with Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement;

(c) Offering to any party other than Northrop Corporation any work, production effort, task, role or responsibility, of any kind or character, to which Northrop Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy subcontract.

(d) Soliciting any offers, bids or proposals, from any party other than Northrop Corporation, to provide, supply, produce or furnish any work, production effort, task, role or responsibility, of any kind or character, to which Northrop Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy subcontract.

(e) Awarding, assigning, contracting, licensing, agreeing or committing, in any fashion, any contract, order, option, purchase or agreement, of any kind or character, to or with any party other than Northrop Corporation to provide, supply, produce or furnish any work, production effort, task, role or responsibility, of any kind or character, to which Northrop

Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy Subcontract.

(f) Using any data, procedures, designs, engineering, techniques, developments, plans, specifications, test results, or information of any other kind or character which is proprietary to Northrop Corporation or derivative of its YF-17 except as specifically expressly authorized by the Basic Agreement.

As to the Third Cause of Action:

2. For a declaration that, with respect to the F/A-18A and any other derivatives of Northrop's YF-17, MDC has been licensed by Northrop to use Northrop's property and to serve as prime contractor only in connection with:

(a) Contracts with the Navy for the development and production of carrier-suitable F/A-18A aircraft purchased by the Navy for its own use or for resale by it to foreign customers; and

(b) Contracts for the sale (either directly, or indirectly through the Navy) to any foreign customer of F-18-type aircraft that conform to the configuration and structure of the F/A-18A being purchased by the Navy for its own use and that are carrier-suitable.

3. For a declaration that, with respect to the F/A-18A and any other derivatives of Northrop's YF-17, MDC has not been licensed and is not entitled to serve as prime contractor in connection with any contracts for development, production or sale other than those described in 3 above; and, in particular, that MDC has not been licensed and is not entitled to serve as prime contractor in connection with sales of any F-18-type aircraft to the Air Force, and has not been licensed and is not entitled to serve as prime contractor in connection with sales to foreign customers of any F-18-type aircraft that do not conform to the configuration and structure of the F/A-18A being purchased by the Navy for its own use or that are not carrier-suitable.

As to the Fourth Cause of Action:

4. For compensatory damages in an amount not less than \$100,000,000, and for punitive damages in the amount of \$300,000,000.

As to the Fifth Cause of Action:

5. For a declaration that Northrop is entitled to the beneficial interest in all prime contracts awarded to MDC for the development or sale of F/A-18A aircraft and all derivatives, versions or variants thereof, and that MDC holds such prime contracts in trust for the benefit of Northrop;

6. For an accounting of profits earned by MDC on all prime contracts awarded to it for the development or sale of F/A-18A aircraft and all derivatives, versions or variants thereof;

7. For judgment in an amount equal to all profits earned by MDC under existing and future prime contracts awarded to it for the development or sale, or both of F/A-18A aircraft and all derivatives, versions or variants thereof;

8. For punitive damages in the amount of \$300,000,000.

As to the Sixth Cause of Action:

9. That this Court award Northrop Corporation treble its actual damages;

10. That this Court restrain and enjoin McDonnell Douglas Corporation and any and all its directors, officers, employees, agents and all other persons and entities acting in concert with or participating with them from any of the following actions without the express written consent of Northrop Corporation:

(a) Offering to sell to or produce for any foreign customer, or representing to such customers that it is authorized to sell or produce, F/A-18A aircraft or any other derivatives of Northrop's YF-17 that are not carrier-suitable and/or do not conform to the configuration and structure of the F/A-18A being purchased by the Navy for its own use;

(b) Offering to sell to or produce for any foreign customer, or representing to such customers that it is authorized to sell or

produce, F/A-18A aircraft or any other derivatives of Northrop's YF-17 on terms that are not consistent with Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement;

(c) Offering to any party other than Northrop Corporation any work production effort, task, role or responsibility, of any kind or character, to which Northrop Corporation is entitled pursuant to (i) Paragraph 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy Subcontract;

(d) Soliciting any offers, bids or proposals, from any party other than Northrop Corporation, to provide, supply, produce or furnish any work, production effort, task, role or responsibility, of any kind or character, to which Northrop Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy Subcontract;

(e) Awarding, assigning, contracting, licensing, agreeing or committing, in any fashion, any contract, order, option, purchase, or agreement, of any kind or character, to or with any party other than Northrop Corporation, to provide, supply, produce or furnish any work, production effort, task, role or responsibility, of any kind or character, to which Northrop Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy Subcontract;

(f) Engaging in any and all acts designed to misappropriate Northrop's proprietary F-18L data;

(g) Misrepresenting to the public that the F/A-18A is an aircraft designed solely by MDC that bears no meaningful relationship to Northrop's YF-17 or was not derived therefrom;

(h) Misrepresenting to foreign customers that Northrop will be unable to deliver to them F-18L aircraft;

11. That the Court award Northrop Corporation its costs and a reasonable attorney's fee in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15.

As to the Seventh Cause of Action:

12. That this Court restrain and enjoin McDonnell Douglas Corporation and any and all of its directors, officers, employees, agents and all other persons and entities acting in concert with or participating with them from any of the following actions without the express written consent of Northrop Corporation:

(a) Offering to sell to or produce for any foreign customer, or representing to such customers that it is authorized to sell or produce, F/A-18A aircraft or any other derivatives of Northrop's YF-17 that are not carrier-suitable and/or do not conform to the configuration and structure of the F/A-18A being purchased by the Navy for its own use;

(b) Offering to sell to or produce for any foreign customer, or representing to such customers that it is authorized to sell or produce, F/A-18A aircraft or any other derivatives of Northrop's YF-17 on terms that are not consistent with Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement;

(c) Offering to any party other than Northrop Corporation any work, production effort, task, role or responsibility, of any kind or character, to which Northrop Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy Subcontract;

(d) Soliciting any offers, bids or proposals, from any party other than Northrop Corporation, to provide, supply, produce or furnish any work, production effort, task, role or responsibility, of any kind or character, to which Northrop Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy Subcontract;

(e) Awarding, assigning, contracting, licensing, agreeing or committing, in any fashion, any contract, order, option, purchase, or agreement, of any kind or character, to or with any party other than Northrop Corporation, to provide, supply, produce or furnish any work, production effort, task, role or responsibility, of any kind or character, to which Northrop

Corporation is entitled pursuant to (i) Paragraphs 5(b) and 5(f) and Attachment 3 of the Basic Agreement and (ii) the Navy Subcontract;

(f) Misrepresenting to customers or the public that the F/A-18A, and variations thereof, are aircraft designed solely by MDC that bear no meaningful relationship to Northrop's YF-17 or are not derived therefrom;

(g) Misrepresenting to customers or the public that Northrop Corporation will not be able to deliver to them F-18L aircraft.

13. That this Court award Northrop Corporation damages in an amount not less than \$100,000,000.

As to the Eighth Cause of Action:

14. For judgment in an amount not less than \$100,000,000.

As to all causes of action:

15. That Northrop may recover its costs of this action; and

16. That the Court grant Northrop such other and further relief as may be just and appropriate.

DATED: December 13, 1979.

OVERTON, LYMAN & PRINCE
PETER BROWN DOLAN
FREDERICK A. CLARK
PATRICK E. BREEN

/s/ By _____
PETER BROWN DOLAN
Attorneys for Plaintiff
NORTHROP CORPORATION

**MCDONNELL'S AMENDED ANSWER AND
COUNTERCLAIM**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL NO. 79-04145 R

NORTHROP CORPORATION,

Plaintiff,

v.

MCDONNELL DOUGLAS CORPORATION,

Defendant.

**DEFENDANT MCDONNELL DOUGLAS CORPORATION'S
FIRST AMENDED ANSWER AND FIRST AMENDED
COUNTERCLAIM TO NORTHROP CORPORATION'S FIRST
AMENDED COMPLAINT**

FIRST AMENDED ANSWER

Comes now defendant McDonnell Douglas Corporation and for its First Amended Answer to the First Amended Complaint of plaintiff Northrop Corporation states as follows:

Jurisdiction and Venue

1. Defendant admits that the matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs, and is between citizens of different states and that plaintiff resides in and defendant is doing business in the Central District of California. Defendant further admits that plaintiff purports to base the jurisdiction of this Court upon 15 U.S.C. §§ 15, 25, and 26. Except as so admitted, defendant denies the averments of paragraph 1. Defendant further states that plaintiff has failed to join an indispensable party to this action and that the exclusive basis for any remedy to which plaintiff could be entitled is prescribed by 22 U.S.C. § 2356.

The Parties

2. Defendant admits the averments of Paragraph 2.
3. Defendant admits the averments of Paragraph 3.

Plaintiff's First Cause Of Action

4. Defendant denies the averments of Paragraph 4.
5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 5 and therefore denies the same.
6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 6 and therefore denies the same.
7. Defendant admits that in the early 1970's the United States Air Force issued a request for proposals to conduct a prototype development program for a lightweight fighter aircraft which the Air Force eventually denominated the Air Combat Fighter (ACF), but defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 7 and therefore denies the same.
8. Defendant admits that plaintiff in 1972 was awarded a prime contract by the Air Force to design, develop and produce two prototype ACF aircraft denominated the "YF-17", that General Dynamics was also awarded a contract for such development of prototype ACF aircraft denominated the "YF-16", and that defendant did not participate in the competition for these prototype contracts. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 8 and therefore denies the same.
9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9 and therefore denies the same.

10. Defendant states that in 1973 the Navy was evaluating the possible procurement of a new fighter aircraft designated by the Navy as the VFAX (Navy fighter/attack experimental aircraft), but except as so stated defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 10 and therefore denies the same.

11. Defendant states that a Congressional Conference Committee issued a directive to the Navy to make maximum use of the Air Force Lightweight Fighter and Air Combat Fighter technology and hardware in connection with its proposed VFAX procurement (redesignated as the Navy Air Combat Fighter (NACF)), but except as so stated defendant denies the averments of Paragraph 11.

12. Defendant admits that in 1974 the Navy issued a presolicitation notice (PSN) for the development of the NACF, but denies the remaining averments of Paragraph 12.

13. Defendant states that the Navy asked each of General Dynamics and plaintiff to develop a "teaming arrangement", within the guidelines of ASPR (DAR) 4-117, rather than a partnership, with a manufacturer which had experience and capability in the design, development, testing, evaluation and production of aircraft for the Navy, but except as so stated defendant denies the averments of Paragraph 13.

14. Defendant admits that defendant and plaintiff entered into negotiations concerning a teaming arrangement and on October 2, 1974 executed a Teaming Agreement (the "Teaming Agreement"). Except as so admitted, defendant denies the averments of Paragraph 14.

15. Defendant admits the averments of Paragraph 15.

16. Defendant states that the Teaming Agreement is the best evidence of the parties' agreement and denies the accuracy of plaintiff's characterization of the agreement as alleged in Paragraph 16. Except as so stated, defendant denies the averments of Paragraph 16.

17. Defendant denies the averments of Paragraph 17.

18. Defendant admits making the statements alleged in Paragraph 18, but states that the statements are taken out of context. Except as so admitted, defendant denies the averments of Paragraph 18.

19. Defendant admits that on May 2, 1975, the Navy announced the selection of defendant as the prime contractor for its NACF and that the Navy redenominated the NACF as the F-18. Except as so admitted defendant denies the remaining averments of Paragraph 19.

20. Defendant states that it entered into an agreement with plaintiff dated June 27, 1975 (the "Basic Agreement"), but except as so stated defendant denies the averments of Paragraph 20.

21. Defendant states that the Basic Agreement is the best evidence of the parties' agreement and admits the language of Paragraph 10 thereof. Except as so admitted, defendant denies the averments of Paragraph 21.

22. Defendant admits the language of Paragraph 3(a) of the Basic Agreement, but except as so admitted denies all other averments of Paragraph 22.

23. Defendant admits the language of Paragraph 3(b) of the Basic Agreement, but except as so admitted denies the averments of Paragraph 23.

24. Defendant states that the Basic Agreement is the best evidence of the agreement between the parties and admits the language of Subparagraph 5(f) thereof. Except as so stated, defendant denies the averments of Paragraph 24.

25. Defendant denies the averments of Paragraph 25.

26. Defendant states that the F-18 prime contract between defendant and the Navy and the subcontract between defendant and plaintiff relating to the full scale development of the F-18 are the best evidence of such agreements. Except as so stated, defendant denies the averments of Paragraph 26.

27. Defendant admits that, among other things, the subcontract from defendant to plaintiff relating to certain F-18 full scale development tasks provides, in part, as alleged by plaintiff in Paragraph 27, but states that said provisions must be read in the context of the entire subcontract and related agreements and therefore denies the remaining averments of Paragraph 27.

28. Defendant admits that, among other things, the subcontract includes the Paragraph "(a)" set out in Paragraph 27 of plaintiff's complaint but states that said provision must be read in the context of the entire subcontract and related agreements and therefore, except as so stated, defendant denies the averments of Paragraph 28.

29. Defendant admits that it has offered to sell to the Government of Canada a quantity of F-18 aircraft of basically the same configuration as those currently under production for the Navy, but except as so admitted denies the averments of Paragraph 29.

30. Defendant denies the averments of Paragraph 30.

31. Defendant denies the averments of Paragraph 31.

32. Defendant admits that it has delivered an executed offer to the Government of Canada for the Canadian F-18 contract but denies all other averments of Paragraph 32.

33. Defendant denies the averments of Paragraph 33.

34. Defendant denies the averments of Paragraph 34.

35. Defendant denies the averments of Paragraph 35.

36. Defendant denies the averments of Paragraph 36.

37. Defendant denies the averments of Paragraph 37.

Second Cause Of Action

38. Defendant denies the averments of Paragraph 38.

39. Defendant incorporates herein its answers and responses to Paragraphs 1 through 28 as set out above in this answer as though fully repeated herein.

40. Defendant denies the averments of Paragraph 40.

41. Defendant denies the averments of Paragraph 41 and affirmatively states that plaintiff is attempting to sell an aircraft intended for Israeli use which is of basically the same configuration as the F-18 which defendant is manufacturing for the United States Navy's use and such attempt to sell such aircraft violates the agreements between the parties.

42. Defendant admits that it seeks to become prime contractor for the sale to the United States for the use of Israel of F-18 aircraft of basically the same configuration as those purchased by the United States Navy for its present or future use, if, when and as any such sale may be authorized by the United States. Except as so stated, defendant denies the averments of Paragraph 42.

43. Defendant denies the averments of Paragraph 43.

44. Defendant denies the averments of Paragraph 44.

45. Defendant denies the averments of Paragraph 45.

46. Defendant denies the averments of Paragraph 46.

47. Defendant denies the averments of Paragraph 47.

48. Defendant denies the averments of Paragraph 48.

Third Cause Of Action

49. Defendant denies the averments of Paragraph 49.

50. Defendant incorporates herein its answers and responses to Paragraphs 1 through 48 as set out above in this answer as though fully repeated and set out herein.

51. Defendant denies the averments of Paragraph 51.

- 52. Defendant denies the averments of Paragraph 52.
- 53. Defendant denies the averments of Paragraph 53.
- 54. Defendant denies the averments of Paragraph 54.
- 55. Defendant denies the averments of Paragraph 55.

Fourth Cause Of Action

- 56. Defendant denies the averments of Paragraph 56.
- 57. Defendant incorporates herein its answers and responses to Paragraphs 1 through 56 as set out above in its answer as though fully repeated herein.
- 58. Defendant states that on or about October 2, 1974 Northrop and MDC entered into the Teaming Agreement, but except as so stated defendant denies the averments of Paragraph 58.
- 59. Defendant denies the averments of Paragraph 59 and further states that plaintiff has failed to plead the circumstances constituting any alleged fraud with the particularity required by Rule 9, Fed. R. Civ. P.
- 60. Defendant denies the averments of Paragraph 60.
- 61. Defendant denies the averments of Paragraph 61.
- 62. Defendant denies the averments of Paragraph 62.
- 63. Defendant denies the averments of Paragraph 63.
- 64. Defendant denies the averments of Paragraph 64.
- 65. Defendant denies the averments of Paragraph 65.
- 66. Defendant denies the averments of Paragraph 66.
- 67. Defendant denies the averments of Paragraph 67.

Fifth Cause Of Action

- 68. Defendant denies the averments of Paragraph 68.

69. Defendant incorporates herein its answers and responses to Paragraphs 1 through 67 as set out above in this answer as though fully repeated herein.

70. Defendant admits that the parties entered into the Teaming Agreement and the Basic Agreement, but except as so admitted denies the averments of Paragraph 70.

71. Defendant denies the averments of Paragraph 71.

72. Defendant denies the averments of Paragraph 72.

73. Defendant denies the averments of Paragraph 73.

74. Defendant denies the averments of Paragraph 74.

75. Defendant states that it seeks to profitably perform its contractual obligations, but except as so stated denies the averments of Paragraph 75.

76. Defendant denies the averments of Paragraph 76.

77. Defendant denies the averments of Paragraph 77.

78. Defendant denies the averments of Paragraph 78.

Sixth Cause Of Action

79. Defendant denies the averments of Paragraph 79.

80. Defendant incorporates herein its answers and responses to Paragraphs 1 through 78 as set out above in its answer as though fully repeated herein.

81. Defendant admits that its production of the F-18A aircraft involves a flow of parts, materials and products in interstate commerce. Defendant denies all the remaining averments in Paragraph 81.

82. Defendant admits that the F-18A is a multimission jet fighter aircraft capable of supersonic speeds and further capable of all weather, day or night operation. Defendant denies all other averments of Paragraph 82.

83. Defendant admits that it is the only contractor to have been awarded a prime contract for the design, development and production of Navy F-18A aircraft. Defendant denies the remaining averments of Paragraph 83.

84. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph 84, and therefore denies the same.

85. Defendant denies the averments of Paragraph 85.

86. Defendant denies the averments of Paragraph 86.

87. Defendant denies the averments of Paragraph 87.

88. Defendant denies the averments of Paragraph 88.

89. Defendant denies the averments of Paragraph 89.

90. Defendant denies the averments of Paragraph 90.

Seventh Cause Of Action

91. Defendant denies the averments of Paragraph 91.

92. Defendant incorporates herein its answers to Paragraphs 1 through 91 as set out above in this answer as though fully repeated herein.

93. Defendant denies the averments of Paragraph 93.

94. Defendant denies the averments of Paragraph 94.

Eighth Cause Of Action

95. Defendant denies the averments of Paragraph 95.

96. Defendant incorporates herein its answers and responses to Paragraphs 1 through 94 as set out above in this answer as though fully repeated herein.

97. Defendant denies the averments of Paragraph 97.

98. Defendant denies the averments of Paragraph 98.

99. Defendant denies the averments of Paragraph 99.

100. Defendant denies the averments of Paragraph 100.

101. Defendant denies the averments of Paragraph 101.

Additional Defenses

First Defense

102. Defendant states that plaintiff has failed to join an indispensable party to its alleged eight causes of action. The United States Government is an indispensable party and cannot be joined in this action, and therefore, plaintiff's eight causes of action should be dismissed.

Second Defense

103. This Court lacks jurisdiction over plaintiff's alleged causes of action. Plaintiff's exclusive remedy for any alleged misappropriation or misuse of an invention or discovery covered by a valid patent or of information that is protected by law and held by the United States subject to restrictions imposed by the owner is prescribed by 22 U.S.C. § 2356; the provisions of the applicable disputes clause of plaintiff's YF-17 prime contract; Armed Services Procurement Regulations (ASPR) Section 7-103.12(a) (Jan. 1958); Section 10 of defendant's Special Subcontract Conditions No. 495 incorporated in defendant's F-18 full scale development subcontract with plaintiff dated 27 April 1976; and the Contract Disputes Act of 1978 (P.L. 95-563, 41 U.S.C. §§ 601-613).

Third Defense

104. Plaintiff has failed in each of its eight alleged causes of action to state a claim upon which relief can be granted and, therefore, plaintiff's complaint should be dismissed.

Fourth Defense

105. Plaintiff's interpretation of the Basic Agreement would convert it from a lawful teaming arrangement into an unlawful allocation of markets and customers among competitors. Plaintiff's interpretation of the Basic Agreement would

further give plaintiff the ability to preclude defendant from competing with it for sales of F-18 aircraft in the world market, which would involve the constant and continuous flow of parts, material and products in, and affect the flow of, interstate and international commerce, thus allowing Northrop to unlawfully restrain such trade.

Fifth Defense

106. Plaintiff has not complied with its obligations under the applicable disputes provisions of the August 26, 1976 Agreement and the subcontract from defendant to plaintiff relating to the full scale development of the F-18.

Sixth Defense

107. Plaintiff is not entitled to any relief because it comes before this Court in material breach of its contractual obligations and with unclean hands in that it has intentionally, among other things:

- (a) represented that it is entitled to and has offered for sale F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for its present or future use.

- (b) failed to continue to furnish to defendant YF-17 and related aircraft design, analysis and test data and to keep defendant fully aware of its design and manufacturing activities.

- (c) breached its implied covenants of good faith and fair dealing in that it has failed to perform its contracts with defendant in good faith.

- (d) refused to accept work offered by defendant to it upon contract terms and conditions that are no more severe than applicable terms contained in prime contracts and asserted both an exclusive right to such work and the unilateral right to dictate its own terms and conditions for any contract offered to it by defendant and arbitrarily to reject any other terms and conditions. Plaintiff's interpretation that it has the exclusive right to all work described in Attachment 3 to the Basic Agreement and

associated with 40 percent of the direct labor hours under any prime contract for F-18 aircraft which defendant may obtain and that it has the right to dictate its own terms and conditions for such work is violative of the provisions of paragraphs 4, 5 and 7 of the Basic Agreement and of the antitrust laws in that it is a restraint of trade and competition.

(e) failed to keep defendant fully informed of plaintiff's F-17/F-18 family marketing activities.

(f) failed to consult and act jointly with defendant with respect to plaintiff's communications to third parties of the understandings reflected in the Basic Agreement.

(g) acquired and misappropriated defendant's technical, manufacturing, and engineering data, drawings, and know-how to further its scheme to market F-18 aircraft of basically the same configuration as the F-18A Hornet aircraft designed, developed and produced by defendant.

(h) tortiously interfered with defendant's competitive marketing efforts for the F-18A Hornet aircraft as follows, among other things:

(i) misrepresented the agreements between defendant and plaintiff, which misrepresentations are contrary to the terms of the agreements and are violative of the antitrust laws.

(ii) engaged in commercial and business disparagement of defendant through false claims and statements with respect to plaintiff's alleged rights under the agreements and plaintiff's alleged proprietary rights in the YF-17 prototype aircraft and the F-18 aircraft.

(iii) misrepresented to the marketplace that the "F-18L" is a "Hornet", that the "F/A-18L baseline configuration" is an "F/A-18A with mandatory FMS changes and a lighter landing gear," and that any of the following changes, among others, would convert the F-18A into an F-18L:

(a) land based landing gear or tail hook;

(b) structural changes, including modified outer wing panel with or without outboard pylons, USAF receptacle in-flight refueling, incorporation of addi-

tional internal chaff and flares, structural changes to lighten the aircraft, wing or control surface modifications, modifications to permit use of external fuel tanks, and modifications to permit customer required external pylons and bomb racks:

(c) deletion of wing-fold or wing-fold activating mechanism;

(d) addition of third outboard wing pylon;

(e) addition of Sparrow capability on wing-tip;

(f) substitution of lighter, land-based landing gear for Navy F/A-18A landing gear;

(g) deletion of carrier suitable arresting hook; and

(h) deletion of catapult launch bar or hold back assembly.

(iv) made false claims and statements that under the parties' agreements defendant is limited to selling "carrier suitable" aircraft and/or aircraft that "conform to the configuration and structure of the F-18 being purchased by the Navy for its own use," which statements are solely calculated to disparage defendant and interfere with defendant's sale of F-18A aircraft.

(v) misrepresented in its marketing activities relating to a land-based derivative of the YF-17 to foreign customers and to the United States that it may offer McDonnell's work and efforts set forth in Attachment I to the Agreement of August 26, 1976 directly to the United States and to foreign customers through the United States, rather than through Northrop as prime contractor.

Seventh Defense

108. Plaintiff has not shown and cannot show any irreparable damage.

Eighth Defense

109. Plaintiff's prayer for injunctive relief fails to satisfy the requisites of Rule 65(d), Federal Rules of Civil Procedure.

Ninth Defense

110. Plaintiff's alleged causes of action and requests for relief are barred by the applicable statutes of limitation and by plaintiff's laches.

Tenth Defense

111. The parties have entered into an agreement compromising and settling in part the alleged dispute between the parties with respect to defendant's proposed sale of F-18A aircraft to Canada.

Eleventh Defense

112. With respect to plaintiff's Fourth, Fifth, Sixth, Seventh and Eighth Causes of Action and in addition to the defenses raised above, plaintiff has failed to plead fraud with particularity in compliance with Rule 9 of the Federal Rules of Civil Procedure.

Twelfth Defense

113. With respect to plaintiff's Eighth Cause of Action and in addition to the defenses raised above, plaintiff has failed to state a claim upon which relief can be granted in quasi-contract (*quantum meruit*). The express terms of the subcontract for the full scale development of the F/A-18A between plaintiff and defendant and the YF-17 prime contract between plaintiff and the United States expressly provide for compensation and these express contracts preclude the existence of a contract implied in law or quasi-contract upon which Plaintiff's claim for recovery in *quantum meruit* could be premised.

Thirteenth Defense

114. Plaintiff filed this action to interfere with and disrupt defendant's participation in the Canadian procurement of a new fighter aircraft and to interfere with and disrupt the United States Government's evaluation of its possible purchase or other arrangements for acquisition and production of

F/A-18A aircraft from or with defendant for possible use by allies of the United States. The filing of this action constituted and continues to constitute an abuse of process designed and calculated to achieve the purposes mentioned above.

WHEREFORE, defendant McDonnell prays that plaintiff's First Amended Complaint and all alleged claims and causes of action therein be dismissed with prejudice; that plaintiff be ordered to pay defendant its costs, expenses and attorneys' fees incurred in connection with this action; and that defendant be granted such other and further relief as may be just and appropriate.

FIRST AMENDED COUNTERCLAIM

Defendant McDonnell Douglas Corporation ("McDonnell" or "MDC") for its counterclaim against plaintiff Northrop Corporation ("Northrop" or "NOC") alleges as follows:

Count I

1. This Court has jurisdiction over this action under 28 U.S.C. §§ 1332(a)(1) and 2201. The amount in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between citizens of different states. Venue lies in the Central District of California under 28 U.S.C. § 1391(a) and (c). Northrop and McDonnell are doing business in the Central District of California.

2. Northrop is a corporation incorporated under the laws of the State of California, having its principal place of business in Los Angeles County, California.

3. McDonnell is a corporation incorporated under the laws of the State of Maryland, having its principal place of business in St. Louis County, Missouri.

4. On October 2, 1974, McDonnell and Northrop entered into a Teaming Agreement "for the purpose of developing, proposing and producing a USAF derivative of the YF-17 (USAF ACF) and a carrier-suitable version of the YF-17

(USN ACF) to satisfy U.S. Navy VFAX requirements." McDonnell and Northrop agreed, among other things, that, recognizing the prior activities of the parties, McDonnell would be prime contractor on USN ACF and Northrop would be associate contractor. Northrop would be prime contractor on USAF ACF and for foreign variants of the USAF ACF and McDonnell would be associate contractor.

5. In January 1975, the United States Government ("Government") announced that Northrop had lost its competition for a prime contract to build the USAF ACF. In May 1975, the Government announced that the U.S. Navy had selected McDonnell to be prime contractor for the design, development and manufacture of the Navy's air combat fighter which the Navy then denominated as the F-18 aircraft. Subsequently, the Navy formally entered into a prime contract with McDonnell to design, develop, test and manufacture the F-18 aircraft and, in turn, McDonnell formally entered into a subcontract with Northrop.

6. On June 27, 1975, McDonnell and Northrop entered into an agreement (the "Basic Agreement") which, by its terms, superseded the Teaming Agreement of October 2, 1974.

7. On August 26 and 28, 1976, McDonnell and Northrop entered into agreements relating to the marketing of F-18 and YF-17 derivative aircraft for foreign military sales.

(a) Paragraph "B" of the agreement of August 26, 1976 provides as follows:

"B. Pursuant to Paragraph 3(b) of the Basic Agreement, NOC has elected to design, develop and produce for sale to the United States and to foreign governments all aircraft designed only for land-based operations which are derived from the YF-17, which aircraft may incorporate such features and equipment designed, developed and/or produced under or in connection with MDC's prime contract with the U.S. Navy for the F-18 family of aircraft as NOC deems appropriate. Such aircraft are hereinafter referred to as the 'LBF-18'. The currently defined configurations of the LBF-18 are described in Northrop docu-

ment NB75-301R, Weapon System Description, dated July, 1976."

(b) Paragraph "C" of the agreement of August 26, 1976 provides as follows:

"C. The foregoing election by NOC is not in derogation of MDC's rights under the Basic Agreement and in particular MDC's rights shall remain as set forth in Paragraph 3(a) of the Basic Agreement."

(c) The agreement of August 28, 1976 amended the Basic Agreement by adding the following new subparagraph (g) to Paragraph 5 thereof:

"(g) Notwithstanding anything to the contrary herein those tasks being performed by NOC at the end of the initial 800 aircraft program will continue to be performed by NOC thereafter."

8. A controversy now exists between McDonnell and Northrop with respect to their respective legal rights under the Basic Agreement of June 27, 1975, their subsequent agreements of August 26 and 28, 1976, and the subcontract between McDonnell and Northrop.

9. Northrop maintains that:

(a) For sales to customers other than the U.S. Navy, McDonnell is restricted to selling to such customers an F-18 aircraft identical to that being purchased by the U.S. Navy, without the right to make any changes necessary to meet the specific requirements of various potential customers.

(b) McDonnell is precluded from selling any F-18 aircraft of any configuration whatsoever to the United States for use by its Air Force.

(c) Northrop has the unqualified right to perform or have performed all of the work described in Attachment 3 to the Basic Agreement with respect to each prime contract for sale of F-18 aircraft that McDonnell may obtain.

(d) Northrop has the unqualified right to perform or have performed by others at least 40 percent of the cumulative direct labor hours per F-18 aircraft under any prime contract which McDonnell may obtain.

(e) With respect to Northrop's allegedly unqualified rights under subparagraphs 9(c) and (d) above, Northrop has the unilateral right to set and dictate its own terms and conditions, including, but not limited to, price for furnishing said work, goods and services.

(f) With respect to Northrop's allegedly unqualified rights under subparagraphs 9(c) and (d) above, Northrop further interprets such rights to preclude McDonnell from competitively procuring comparable goods and services from other potential contractors under any circumstances whatsoever.

(g) If, under a prime contract for the sale of the F-18 aircraft, work is reduced, for example, because of government furnished equipment or services, because of contract designated procurements, or because of offset work terms of a prime contract, resulting in less work being available for assignment, McDonnell may not rebalance the work between the parties.

(h) As prime contractor of a land-based derivative of the YF-17 Northrop may offer McDonnell's work and efforts set forth in Attachment I of the Agreement of August 26, 1976 directly to the United States and to foreign customers through the United States, rather than through Northrop as prime contractor.

10. McDonnell disputes Northrop's contentions and maintains that, subject to the rights of the United States Government, by the terms of the agreements between the parties and under the antitrust laws of the United States (15 U.S.C. § 1), of the State of California, California Business and Professions Code (§§ 16700 *et seq.*), and of the State of Missouri (§§ 416.011 *et seq.*, Mo. Rev. Stat):

(a) McDonnell has the right to sell F-18 aircraft designed, developed and produced by McDonnell for sale to the United States Navy for its own present and future use.

(b) McDonnell has the right to sell to foreign customers and to the Government for any use, including without limitation, the use of the United States Air Force, "F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for the latter's present or future

use (for example, configuration and equipment changes to achieve a reconnaissance capability for potential customers would still be considered 'basically the same configuration')."

(c) "Basically the same configuration" as so defined by example, and not limitation, includes changes to the configuration and structure of the F-18 aircraft being purchased by the Navy to an extent of at least a quantitative and substantive level of 35 percent change and changes to the aircraft necessary to meet the specific and peculiar needs of individual potential customers, including the United States, and, with the approval and any other necessary actions of the United States, foreign customers, to enable McDonnell to effectively compete in the marketplace with other derivatives of the YF-17 aircraft.

(d) "Basically the same configuration" as so defined by example, and not limitation, does not restrict McDonnell to selling F-18 aircraft that are "carrier suitable and/or which conform to the configuration and structure of the F-18 being purchased by the Navy for its own use".

(e) Northrop may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the YF-17, other than those referred to in paragraphs (a) through (d) above.

(f) Northrop may not sell F-18 aircraft of basically the same configuration as those developed and produced by McDonnell for the United States Navy, as so defined.

(g) Northrop does not have an unqualified right to perform or have others perform for it the F-18 work described in Attachment 3 to the Basic Agreement.

(h) Northrop does not have an unqualified right to perform or have others perform for it 40% of the cumulative average direct labor hours per aircraft associated with the initially anticipated United States Navy 800 F-18 aircraft production program.

(i) At the end of the Full Scale Development prime contract manufacturing effort, McDonnell has the right to transfer vertical tail production from Northrop to McDonnell if McDonnell's good faith projection of Northrop's share of production for the initially anticipated United States Navy 800 F-18 aircraft program exceeds 42% of the cumulative average direct labor hours for such aircraft.

(j) From time to time, during the initially anticipated United States Navy 800 F-18 aircraft production program, McDonnell has the right and obligation to rebalance the work of the parties if its good faith projection of the cumulative direct labor hours of the parties for such aircraft is that Northrop's share of production is greater than or less than approximately 40% of the cumulative direct labor hours for such aircraft.

(k) Except as provided in paragraphs (1) and/or (m) below, Northrop will be entitled to continue to perform or have others perform for it the F-18 work being performed by or for it at the end of initially anticipated United States Navy 800 F-18 aircraft production program.

(l) If, under a prime contract obtained by McDonnell for the sale of F-18 aircraft, the additional work obtained and available for assignment between the parties, as and with other F-18 work assigned between them, is reduced, for example, because of government furnished equipment or services, because of contract designated procurement of work or services for the aircraft, or because of offset work terms of the contract, McDonnell may rebalance the available F-18 work between the parties, so that Northrop will have approximately 40% of the cumulative average direct labor hours per aircraft, consisting to the extent reasonably practicable of tasks described in Attachment 3 to the Basic Agreement.

(m) If, under a prime contract obtained by McDonnell for the sale of F-18 aircraft, the additional work obtained is subject to offset terms, McDonnell may offer Northrop's approximate 40% share of such additional work to it on such terms, for performance by it or by others for it, in accordance with such terms, provided such terms as to Northrop's said share of production are no more severe than those applicable to McDonnell's share of production of such aircraft.

(n) Northrop cannot, consistent with its obligations of good faith and fair dealing to McDonnell, reject F-18 work offered to it by McDonnell on account of the offer of the work on terms and conditions including a rebalancing requirement and/or offset terms consistent with paragraphs (1) and/or (m) above.

(o) If McDonnell proposes to offer F-18 production work to Northrop on terms and conditions no more severe than those applicable to McDonnell's production work under the respective prime contract proposal by McDonnell, Northrop cannot, consistent with its obligations of good faith and fair dealing to McDonnell, refuse to cooperate as may reasonably be required with the preparation of McDonnell's proposals in respect thereof.

(p) If McDonnell offers F-18 production work to Northrop on terms and conditions no more severe than those applicable to McDonnell's production work under the respective prime contract obtained by McDonnell, Northrop cannot, consistent with its obligations of good faith and fair dealing to McDonnell, refuse to accept such work if the terms and conditions offered therefor, in addition to the terms referred to in paragraph (n) above, are at least as favorable to Northrop as those for its F-18 work under United States Navy F-18 production subcontract from McDonnell being or to be performed at or about the same time.

(q) If Northrop properly rejects a subcontract for F-18 work tendered to it by McDonnell, McDonnell has the right to produce and procure comparable work, goods, and services from any other potential supplier or subcontractor, including the right to freely select and negotiate proposals and contract for such work with such suppliers and subcontractors without any obligation subsequently to reoffer all or any part of such work to Northrop.

(r) As prime contractor of a land-based derivative of a YF-17 Northrop may not offer McDonnell's work and efforts set forth in Attachment I of the Agreement of August 26, 1976 directly to the United States and to foreign customers through the United States, rather than through Northrop as prime contractor.

11. Alternatively, McDonnell maintains that:

(a) McDonnell may not be restrained and eliminated from competition for sales of F-18 aircraft to customers other than the U.S. Navy or from offering to such customers F-18 aircraft incorporating such changes as are necessary to meet the specific requirements of such potential customers.

(b) McDonnell may not be restrained and eliminated from competition for sales of any and all variants of F-18 aircraft to the U.S. Air Force.

(c) McDonnell is not presently obligated, and cannot be compelled, to perform or observe any of the terms or conditions of the Basic Agreement, the August 26 and August 28, 1976 agreements of the parties, or clause F-3 of the Additional Special Conditions to the F-18 full scale development subcontract from McDonnell to Northrop insofar as they purport to obligate McDonnell to procure from Northrop additional quantities of the items called for under the subcontract or any other provisions of the subcontract prospectively implementing the Basic Agreement, or the August 26 or August 28, 1976 agreements, which by reason of ensuing events occurring after August 28, 1976 have become void and unenforceable.

12. A judicial determination of the controversy between the parties and a declaration as to their rights under their agreements, subject to the rights of the Government, are necessary and appropriate to enable McDonnell to offer to sell, to sell and to subcontract or otherwise arrange for the manufacture of F-18 aircraft and Northrop to offer to sell, to sell and to subcontract for the manufacture of all derivatives of the YF-17 aircraft other than those referred to in paragraphs 10(a) through (d), above, and to enable prospective customers to make procurement decisions free of conflicting claims between the parties as to their respective rights to offer to sell, to sell and to subcontract for the manufacture of the respective derivatives of the YF-17 aircraft.

WHEREFORE, McDonnell Douglas Corporation prays:

1. For an order declaring and adjudicating that, subject to the rights of the United States Government:

(a) McDonnell has the right to sell F-18 aircraft designed, developed and produced by McDonnell for sale to the United States Navy for its own present and future use.

(b) McDonnell has the right to sell to foreign customers and to the Government for any use, including, without

limitation, the use of the United States Air Force, "F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for the latter's present or future use (for example, configuration and equipment changes to achieve a reconnaissance capability for potential customers would still be considered 'basically the same configuration')".

(c) "Basically the same configuration" as so defined by example, and not limitation, includes changes to the configuration and structure of the F-18 being purchased by the Navy to the extent of at least a quantitative and substantive level of 35 percent change and changes to the aircraft necessary to meet the specific and peculiar needs of individual potential customers, including the United States, and, with the approval and any other necessary actions of the United States, foreign customers, to enable McDonnell to effectively compete in the marketplace with other derivatives of the YF-17 aircraft.

(d) "Basically the same configuration" as so defined by example, and not limitation, does not restrict McDonnell to selling F-18 aircraft that are "carrier suitable and/or which conform to the configuration and structure of the F-18 being purchased by the Navy for its own use."

(e) Northrop may elect to be prime contractor on any or all contracts for the development and production of aircraft derived from the YF-17 other than those referred to in paragraphs (a) through (d) above.

(f) Northrop may not sell F-18 aircraft of basically the same configuration as that developed and produced by McDonnell for the United States Navy, as so defined.

(g) Northrop does not have an unqualified right to perform or have others perform for it the F-18 work described in Attachment 3 to the Basic Agreement.

(h) Northrop does not have an unqualified right to perform or have others perform for it 40% of the cumulative average direct labor hours per aircraft associated with the initially anticipated United States Navy 800 F-18 aircraft production program.

(i) At the end of the Full Scale Development prime contract manufacturing effort McDonnell has the right to transfer vertical tail production from Northrop to McDon-

nell if McDonnell's good faith projection of Northrop's share of production for the initially anticipated United States Navy 800 F-18 aircraft program exceeds 42% of the cumulative average direct labor hours for such aircraft.

(j) From time to time, during the initially anticipated United States Navy 800 F-18 aircraft production program, McDonnell has the right and obligation to rebalance the work of the parties if its good faith projection of the cumulative direct labor hours of the parties for such aircraft is that Northrop's share of production is greater than or less than approximately 40% of the cumulative direct labor hours for such aircraft.

(k) Except as provided in paragraphs (l) and/or (m) below, Northrop will be entitled to continue to perform or have others perform for it the F-18 work being performed by or for it at the end of the initially anticipated United States Navy 800 F-18 aircraft production program.

(l) If, under a prime contract obtained by McDonnell for the sale of F-18 aircraft the additional work obtained and available for assignment between the parties, as and with other F-18 work assigned between them, is reduced, for example, because of government furnished equipment or services, because of contract designated procurement of work or services for the aircraft, or because of offset work terms of a prime contract, McDonnell may rebalance the available F-18 work between the parties, so that Northrop will have approximately 40% of the cumulative average direct labor hours per aircraft, consisting to the extent reasonably practicable of tasks described in Attachment 3 to the Basic Agreement.

(m) If, under a prime contract obtained by McDonnell for the sale of F-18 aircraft, the additional work obtained is subject to offset terms, McDonnell may offer Northrop's approximate 40% share of such additional work to it on such terms for performance by it or by others for it in accordance with such terms, provided such terms as to Northrop's said share of production are no more severe than those applicable to McDonnell's share of production of such aircraft.

(n) Northrop cannot, consistent with its obligation of good faith and fair dealing to McDonnell, reject F-18 work

offered to it by McDonnell on account of the offer of the work on terms and conditions including a rebalancing requirement and/or offset terms consistent with paragraphs (l) and/or (m) above.

(o) If McDonnell proposes to offer F-18 production work to Northrop on terms and conditions no more severe than those applicable to McDonnell's production work under the respective prime contract proposal by McDonnell, Northrop cannot, consistent with its obligations of good faith and fair dealing to McDonnell, refuse to cooperate as may reasonably be required in the preparation of McDonnell's proposals in respect thereof.

(p) If McDonnell offers F-18 production work to Northrop on terms and conditions no more severe than those applicable to McDonnell's production work under the respective prime contract obtained by McDonnell, Northrop cannot, consistent with its obligations of good faith and fair dealing to McDonnell, refuse to accept such work if the terms and conditions offered therefore, in addition to the terms and conditions referred to in paragraph (n) above, are at least as favorable to Northrop as those for its F-18 work under United States Navy F-18 production subcontracts from McDonnell being or to be performed at or about the same time.

(q) If Northrop properly rejects a subcontract for F-18 work tendered to it by McDonnell, McDonnell has the right to produce and procure comparable work, goods, and services from any other potential supplier or subcontractor, including the right to freely select and negotiate proposals and contract for such work with such suppliers and subcontractors without any obligation subsequently to re-offer all or any part of such work to Northrop.

(r) As prime contractor of a land-based derivative of a YF-17 Northrop may not offer McDonnell's work and efforts set forth in Attachment I of the Agreement of August 26, 1976 directly to the United States and to foreign customers through the United States, rather than through Northrop as prime contractor.

2. Alternatively, for an order declaring and adjudicating that:

(a) McDonnell may not be restrained and eliminated from competition for sales of F-18 aircraft to customers other than the U.S. Navy or from offering to such customers the F-18 aircraft incorporating such changes as are necessary to meet the specific requirements of such potential customers.

(b) McDonnell may not be restrained and eliminated from competition for sales of any and all variants of F-18 aircraft to the U.S. Air Force.

(c) McDonnell is not presently obligated, and cannot be compelled, to perform or observe any of the terms or conditions of the Basic Agreement, the August 26 and August 28, 1976 agreements of the parties, or clause F-3 of the Additional Special Conditions to the F-18 full scale development subcontract from McDonnell to Northrop insofar as they purport to obligate McDonnell to procure from Northrop additional quantities of the items called for under the subcontract or any other provisions of the subcontract prospectively implementing the Basic Agreement, or the August 26 or August 28, 1976 agreements, which by reason of ensuing events occurring after August 28, 1976 have become void and unenforceable.

3. Under both and either declaration that:

a. McDonnell be awarded recovery of its costs, expenses and attorneys' fees; and

b. McDonnell be awarded such further relief as this Court may in its discretion deem appropriate.

Count II

13. McDonnell incorporates by reference the allegations of Paragraphs 1 through 10 of Count I as though fully repeated herein.

14. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1337 and 15 U.S.C. § 26, and venue is properly in the Court pursuant to 28 U.S.C. § 1391 (b) and (c) and 15 U.S.C. § 22.

15. Northrop's interpretation of the agreements between the parties, as set forth in paragraph 9 above, would render these agreements unlawful as contracts unreasonably restraining trade and commerce among the several states and with foreign nations, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1; Section 3 of the Clayton Act, 15 U.S.C. § 14; Section 16700 *et seq.* of the California Business and Professions Code; and Section 416.011 *et seq.* (Mo. Rev. Stat.).

16. Northrop, in concert with others, has taken the position described in paragraph 9 above with, among others, the United States Government and other present and potential customers for fighter aircraft, in furtherance of its efforts to impose an unlawful interpretation of its agreements with McDonnell.

17. Unless enjoined, Northrop will continue its efforts to impose an unlawful interpretation of its agreements with McDonnell for the purpose and with the effect of restraining McDonnell from competing fairly in the foreign and domestic market for fighter aircraft. McDonnell has no adequate remedy at law. Unless restrained, Northrop will cause irreparable injury to McDonnell's goodwill and business position.

WHEREFORE, McDonnell prays that the Court:

(1) Enter an order, pursuant to applicable federal and state laws, enjoining Northrop from representing to anyone, including the United States Government and other present or potential customers for fighter aircraft, that:

(a) With respect to sales to customers other than the U.S. Navy, McDonnell is restricted to selling an F-18 aircraft identical to that being purchased by the U.S. Navy, without the right to make any changes necessary to meet the specific requirements of various potential customers;

(b) McDonnell is precluded from selling any F-18 aircraft of any configuration whatsoever to the U.S. Air Force;

(c) Northrop has the unqualified right, on terms and conditions dictated by it, to perform or have performed by others all of the work described in Attachment 3 to the Basic Agreement with respect to each prime contract for sale of F-18 aircraft that McDonnell may obtain;

(d) Northrop has the unqualified right, on terms and conditions dictated by it, to perform or have performed by others approximately 40 percent of the cumulative direct labor hours per F-18 aircraft under any applicable prime contract for the sale of F-18 aircraft that McDonnell may obtain;

(e) With respect to Northrop's allegedly unqualified rights under subparagraphs (c) and (d), above, Northrop has the unilateral right to set and dictate its own terms and conditions including, but not limited to, price for furnishing said work, goods and services;

(f) With respect to Northrop's allegedly unqualified rights under subparagraphs (c) and (d), above, McDonnell is precluded from competitively procuring comparable goods and services from other potential contractors under any circumstances whatsoever; and

(g) If, under a prime contract for the sale of the F-18 aircraft, work is reduced, for example, because of Government furnished equipment or services, because of contract designated procurements, or because of offset work terms of a prime contract, resulting in less work being available for assignment, McDonnell may not rebalance the work between the parties.

(2) Enter an order awarding defendant its costs, expenses and attorneys' fees incurred in connection with this action; and

(3) Award defendant such other and further relief as may be just and proper.

Count III

18. McDonnell incorporates its allegations of Paragraphs 1 through 10 of Count I and paragraphs 14 through 16 of Count II set out above in this counterclaim as if fully repeated and set out in full herein.

19. Paragraph 20(b) of the Basic Agreement provides, in part:

"Both parties will provide data, design review participation, and on-site technical liaison at the other's plant to assure that both parties are fully aware of the design and manufacturing activities of the other party."

20. Paragraph 8 of the Basic Agreement provides, in part:

"Each party shall keep the other fully informed of its F-17/F-18 family marketing activities."

21. Paragraph 11 of the Basic Agreement provides as follows:

"MDC and NOC will consult and act jointly with respect to the communication of the understandings reflected herein to third parties."

22. The agreement between McDonnell and Northrop dated 28 August 1976 provides, in part, as follows:

"Subject to the concurrence of the U.S. Navy, Northrop Corporation and McDonnell Douglas Corporation have agreed that henceforth both companies will designate this aircraft [Northrop's aircraft to be derived from the YF-17 referenced in Northrop's Master Plan for Foreign military sales] as the Northrop LBF-18 or the Cobra (but not the LBF-18 Cobra)."

Thus, it was agreed that the parties would designate the Northrop aircraft as the LBF-18 or the Cobra, not the F-18L or the "Hornet". McDonnell has adopted the trade name "Hornet" for its F-18A and uses that designation in describing, marketing, promoting, advertising and offering for sale its F-18A. McDonnell has never given Northrop permission to use its trade name "Hornet" to describe Northrop's version of its derivative of the YF-17 aircraft.

23. In continuing breaches and violations of the agreements between the parties, Northrop:

(a) has communicated and continues to communicate to third parties with respect to the parties' understanding as reflected in the Basic Agreement, without consulting

and acting jointly with McDonnell as required by Paragraph 11 of the Basic Agreement.

(b) has misrepresented and continues to misrepresent to third parties, without consulting and acting jointly with McDonnell that, under the Basic Agreement and the agreements of August 26 and August 28, 1976:

(i) McDonnell is limited to selling only carrier-suitable F-18 aircraft;

(ii) McDonnell cannot add or delete any parts or components which make the F-18A "noncarrier-suitable";

(iii) McDonnell is precluded from offering for sale or selling any F-18 aircraft which do not conform to the configuration and structure of the F-18 being purchased by the Navy for its own use;

(iv) McDonnell is precluded from selling any F-18 aircraft of any configuration whatsoever to the U.S. Air Force;

(v) Northrop has the unqualified right, on terms and conditions dictated by it, to perform or have performed all of the work described in Attachment 3 to the Basic Agreement with respect to each prime contract for sale of F-18 aircraft that McDonnell may obtain;

(vi) Northrop has the unqualified right, on terms and conditions dictated by it, to perform or have performed by others approximately 40 percent of the cumulative direct labor hours per F-18 aircraft under any prime contract for the sale of F-18 aircraft which McDonnell may obtain;

(vii) With respect to Northrop's allegedly unqualified rights under subparagraphs (v) and (vi), above, Northrop has the unilateral right to set and dictate its own terms and conditions, including, but not limited to, price for furnishing said work, goods and services;

(viii) With respect to Northrop's allegedly unqualified rights under subparagraphs (v) and (vi), above, Northrop has the right to preclude McDonnell from competitively procuring comparable goods and services from other potential contractors under any circumstances whatsoever; and

(ix) If, under a prime contract for the sale of the F-18 aircraft, work is reduced, for example, because of Government furnished equipment or services, because of contract designated procurements, or because of offset work terms of a prime contract, resulting in less work being available for assignment, McDonnell may not rebalance the work between the parties.

(c) has used and continues to use, without McDonnell's consent and permission and over the repeated objections of McDonnell, McDonnell's trade name "Hornet" in describing Northrop's aircraft in its marketing efforts, offers to sell the aircraft, promotional material and publicity releases to the media and in other communications to the public and potential customers.

(d) has offered and continues to offer for sale F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for the latter's present or future use.

(e) has failed and continues to fail to furnish McDonnell YF-17 and related aircraft design, analysis and test data and to keep defendant fully aware of its design and manufacturing activities.

(f) has breached and continues to breach its implied covenants of good faith and fair dealing in that it has failed to perform its contracts with McDonnell in good faith.

(g) has refused and continues to refuse to accept work offered by McDonnell to it upon contract terms and conditions that are no more severe than applicable terms contained in prime contracts and has asserted and continues to assert the unilateral right to dictate its own terms and conditions for any contract offered to it by McDonnell and arbitrarily to reject any other terms and conditions. Northrop's interpretation that it has the exclusive right to all work described in Attachment 3 to the Basic Agreement and associated with 40 percent of the direct labor hours under any prime contract for F-18 aircraft which McDonnell may obtain and that it has the right to dictate its own terms and conditions for such work is violative of the provisions of paragraphs 4, 5 and 7 of the Basic Agreement and is violative of the antitrust laws in that it is a restraint of trade and competition.

(h) has failed to keep defendant fully informed of Northrop's F-17/F-18 family marketing activities.

(i) has acquired and misappropriated and continues to acquire and misappropriate McDonnell's technical, manufacturing and engineering data, drawings and know-how to further its scheme to market F-18 aircraft of basically the same configuration as the F-18A Hornet aircraft designed, developed and produced by McDonnell.

(j) has tortiously interfered and continues to tortiously interfere with McDonnell's competitive marketing efforts for the F-18A Hornet aircraft by, among other things:

(i) misrepresenting the agreements between McDonnell and Northrop, which misrepresentations are contrary to the terms of the agreements and are violative of the antitrust laws;

(ii) engaging in commercial and business disparagement of McDonnell through false claims and statements with respect to Northrop's alleged rights under the agreements and Northrop's alleged proprietary rights in the YF-17 prototype aircraft and the F-18 aircraft;

(iii) misrepresenting that the "F-18L" is a "Hornet";

(iv) misrepresenting that Northrop is entitled to sell an "F/A-18L with mandatory FMS changes and a lighter landing gear," and that any of the following changes would convert the F-18A into an F-18L:

(a) land-based landing gear or tail hook;

(b) structural changes, including modified outer wing panel with or without outboard pylons, USAF receptacle in-flight refueling, incorporation of additional internal chaff and flares, structural changes to lighten the aircraft, wing or control surface modifications, modifications to permit use of external fuel tanks, and modifications to permit customer required external pylons and bomb racks;

(c) deletion of wing-fold or wing-fold activating mechanism;

(d) addition of third outboard wing pylon;

- (e) addition of Sparrow capability on wing-tip;
- (f) substitution of lighter, land-based landing gear for Navy F/A-18A landing gear;
- (g) deletion of carrier-suitable arresting hook; and
- (h) deletion of the catapult launch bar or hold back assembly;

(v) making false claims and statements that under the parties' agreements McDonnell is limited to selling "carrier-suitable" aircraft and/or aircraft that "conform" to the configuration and structure of the F-18 being purchased by the Navy for its own use," which statements are solely calculated to disparage McDonnell and interfere with McDonnell's sale of the F-18A aircraft; and

(vi) misrepresenting in its marketing activities relating to a land-based derivative of the YF-17 to foreign customers and to the United States that it may offer McDonnell's work and efforts set forth in Attachment I to the Agreement of August 26, 1976 directly to the United States and to foreign customers through the United States, rather than through Northrop as prime contractor.

24. Not only do the actions described above in Paragraph 23 constitute breaches of contract by Northrop of a continuing nature, but they also constitute tortious interference by Northrop in McDonnell's business relationships and disparagement of McDonnell's business and property.

25. Northrop's course of conduct, as described in Paragraph 23 above, constitutes common law unfair competition, and constitutes an unlawful, unfair and fraudulent business practice in violation of Section 17200 *et seq.* of the California Business and Professions Code.

26. Northrop's course of conduct, as described in Paragraph 23 above, constitutes unfair, deceptive, untrue and misleading advertising, in violation of Sections 17200 *et seq.* and 17500 *et seq.* of the California Business and Professions Code.

27. McDonnell has no adequate remedy at law. Unless restrained, Northrop will cause irreparable injury to McDonnell's goodwill and business position.

WHEREFORE, McDonnell prays that this Court:

1. Enter its order permanently enjoining Northrop and any and all of its directors, officers, employees, agents and all other persons and entities acting in concert with or participating with them or any of them from the following actions:

(a) communicating to third parties, without consulting and acting jointly with McDonnell, with respect to the understandings reflected in the Basic Agreement;

(b) misrepresenting to third parties without consulting and acting jointly with McDonnell that:

(i) McDonnell is limited to offering for sale and selling F-18 aircraft which are "carrier-suitable";

(ii) McDonnell cannot add or delete any aircraft parts and components which would render the F-18A "non-carrier suitable";

(iii) McDonnell is precluded from offering for sale or selling any F-18 aircraft which do not conform to the configuration and structure of the F-18 being purchased by the Navy for its own use;

(iv) McDonnell is precluded from selling any F-18 aircraft of any configuration to the United States Air Force;

(v) Northrop has the unqualified right, on terms and conditions dictated by it, to perform or have performed all of the work described in Attachment 3 to the Basic Agreement with respect to each prime contract for sale of F-18 aircraft that McDonnell may obtain;

(vi) Northrop has the unqualified right, on terms and conditions dictated by it, to perform or have performed by others approximately 40 percent of the cumulative direct labor hours per F-18 aircraft under any prime contract for the sale of F-18 aircraft which McDonnell may obtain;

(vii) With respect to Northrop's allegedly unqualified rights under subparagraphs (v) and (vi), above, Northrop has the unilateral right to set and dictate its own terms and conditions, including, but not limited to, price for furnishing said work, goods and services;

(viii) With respect to Northrop's allegedly unqualified rights under subparagraphs (v) and (vi) above, Northrop has the right to preclude McDonnell from competitively procuring comparable goods and services from other potential contractors under any circumstances whatsoever; and

(ix) If, under a prime contract for the sale of the F-18 aircraft, work is reduced, for example, because of Government furnished equipment or services, because of contract designated procurements, or because of offset work terms of a prime contract, resulting in less work being available for assignment, McDonnell may not rebalance the work between the parties;

(c) appropriating McDonnell's trade name "Hornet" in referring to or describing Northrop's aircraft derived from the YF-17 or F-18;

(d) offering for sale F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for its present or future use (for example, configuration and equipment changes to achieve a reconnaissance capability for a potential customer would still be considered "basically the same configuration");

(e) failing to continue to furnish to McDonnell YF-17 and related aircraft design, analysis and test data and to keep defendant fully aware of its design and manufacturing activities;

(f) breaching its implied covenants of good faith and fair dealing by failing to perform its contracts with McDonnell in good faith;

(g) refusing to accept work offered by McDonnell to it upon contract terms and conditions that are no more severe than applicable terms contained in prime contracts and asserting the unilateral right to dictate its own terms and conditions for any contract offered to it by McDonnell;

(h) failing to keep McDonnell fully informed of Northrop's F-17/F-18 family marketing activities;

(i) acquiring and misappropriating McDonnell's technical, manufacturing and engineering data, drawings, and know-how to further its scheme to market F-18 aircraft of basically the same configuration as McDonnell's F-18A Hornet aircraft;

(j) tortiously interfering with McDonnell's competitive marketing efforts for the F-18A Hornet aircraft as follows:

(i) misrepresenting the agreements between McDonnell and Northrop;

(ii) engaging in commercial and business disparagement of McDonnell through false claims and statements with respect to Northrop's alleged rights under the agreements and Northrop's alleged proprietary rights in the YF-17 prototype aircraft and the F-18 aircraft;

(iii) misrepresenting that the "F-18L" is a "Hornet";

(iv) misrepresenting that Northrop is entitled to sell an "F/A-18L with mandatory FMS changes and a lighter landing gear," and that any of the following changes would convert the F-18A into an F-18L:

(a) land-based landing gear or tail hook;

(b) structural changes, including modified outer wing panel with or without outboard pylons, USAF receptacle in-flight refueling, incorporation of additional internal chaff and flares, structural changes to lighten the aircraft, wing or control surface modifications, modifications to permit use of external fuel tanks, and modifications to permit customer required external pylons and bomb racks;

(c) deletion of wing-fold or wing-fold activating mechanism;

(d) addition of third outboard wing pylon;

(e) addition of Sparrow capability on wing-tip;

(f) substitution of lighter, land-based landing gear for Navy F/A-18A landing gear;

(g) deletion of carrier-suitable arresting hook; and

(h) deletion of the catapult launch bar or hold back assembly;

(v) asserting false claims and statements that, under the parties' agreements, McDonnell is limited to selling "carrier-suitable" aircraft and/or aircraft that "conform to the configuration and structure of the F-18 being purchased by the Navy for its own use";

(vi) misrepresenting in its marketing activities relating to a land-based derivative of the YF-17 to foreign customers and to the United States that it may offer McDonnell's work and efforts set forth in Attachment I to the Agreement of August 26, 1976 directly to the United States and to foreign customers through the United States, rather than through Northrop as prime contractor.

2. Award McDonnell its expenses, costs and reasonable attorneys' fees incurred in connection with this action.

3. Award McDonnell such other and further relief as this Court may deem just and appropriate.

Count IV

28. McDonnell incorporates the allegations of Paragraphs 1 through 12 of Count I, Paragraphs 14 through 16 of Count II, and Paragraphs 19 through 26 of Count III as if set forth in full herein.

29. Prior to and at the time of the Basic Agreement, Northrop had a duty to disclose to McDonnell Northrop's intent to:

(a) offer for sale an F-18 aircraft of basically the same configuration as the McDonnell F-18A aircraft then in the design and development stages for the United States Navy; and

(b) confine McDonnell to a "carrier-suitable" aircraft and/or aircraft that "conform to the configuration and structure of the F-18 being purchased by the Navy for its own use," and preclude McDonnell from selling F-18 air-

craft to foreign governments in derogation of McDonnell's rights under Paragraph 3(a) of the Basic Agreement.

30. Prior to and at the time of the August 26, 1976 Agreement, Northrop had a duty to disclose Northrop's intent as set forth in paragraph 26, and further had a duty to disclose to McDonnell Northrop's intent to:

(a) appropriate features and equipment of McDonnell's F-18A Hornet and thereby avoid the requirement that Northrop "design, develop and produce" for sale to foreign governments "aircraft designed only for land-based operations which are derived from the YF-17"; and

(b) interpret said Agreement in derogation of McDonnell's rights under the Basic Agreement and preclude McDonnell from selling to foreign countries "F-18 aircraft of basically the same configuration as those purchased by the U.S. Navy for its present and future use (for example, configuration and equipment changes to achieve a reconnaissance capability for a potential customer would still be considered 'basically the same configuration')".

31. Prior to and at the time of the August 26, 1976 Agreement, contrary to Northrop's true intent, representatives of Northrop represented to McDonnell that Northrop intended to design, develop and produce a cheap lightweight, land-based derivative of the YF-17.

32. Northrop's failure to disclose its true intent together with its positive misrepresentations induced McDonnell to enter into these agreements. These misrepresentations were material and calculated to result and did result in McDonnell's justified reliance on Northrop's representations in entering into the agreements.

33. In furtherance of its scheme to defraud and its concomitant active concealment of its true intent, Northrop, through its officers, agents and representatives, has continued to this date its misappropriation of McDonnell's F-18A Hornet aircraft and has clandestinely asserted its misinterpretation of the agreement to representatives of foreign governments.

34. Not until the filing of Northrop's sham suit with this Court was its carefully concealed intent revealed.

35. Northrop's misrepresentations through silence and active concealment of its true intent has damaged McDonnell in an amount in excess of \$100,000,000.

WHEREFORE, McDonnell prays this Court to enter its order awarding McDonnell its damages together with its costs and attorneys' fees and such further relief as this Court may deem appropriate.

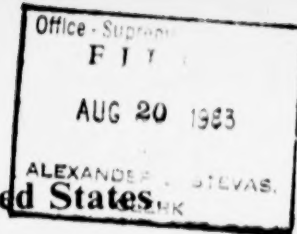
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83-88



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

McDONNELL DOUGLAS CORPORATION,
Petitioner,

vs.

NORTHROP CORPORATION,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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August 17, 1983

STATEMENT REQUIRED BY RULE 28.1

This Brief is filed on behalf of Northrop Corporation, which has no parent companies. It has direct or indirect equity interests in the following companies (in addition to its wholly owned subsidiaries):

Construcciones Aeronautics, S.A. (CASA)

Electronica Basica, S.A. (ELBASA)

Fuller-Shuwayer Co., Ltd.

N.V. Koninklijke Nederlandse Vliegtuigenfabriek Fokker

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

McDONNELL DOUGLAS CORPORATION

Petitioner,

vs.

NORTHROP CORPORATION,

Respondent.

**NORTHROP CORPORATION'S BRIEF IN OPPOSITION
TO McDONNELL DOUGLAS CORPORATION'S
PETITION FOR A WRIT OF CERTIORARI**

Northrop Corporation respectfully prays that this Court refuse to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above action on February 28, 1983, as modified on May 9, 1983.

I

INTRODUCTION

This is an action in which Northrop Corporation ("Northrop") seeks relief for McDonnell Douglas Corporation's ("MDC") systematic breaches of contract, fraud and other predatory conduct in violation of Section 2 of the Sherman Act.¹ The Court of Appeals for the Ninth Circuit ("Ninth Circuit") has reversed an order granting summary judgment and dismissal on the principal ground that genuine issues of material fact render summary disposition inappropriate. There

¹ Sherman Antitrust Act, 15 U.S.C. § 2 (1976).

has been no trial on the merits and discovery is incomplete. MDC's arguments supporting its Petition for Writ of Certiorari are either erroneous legal contentions or are based on hotly contested factual issues.

MDC argues an astounding and dangerous proposition. It claims that because of the structure and operation of the weapons procurement industry, it is totally unaccountable for predatory conduct that the Ninth Circuit found to be "without legitimate business purpose." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1058 (9th Cir. 1983). Using the doctrines of indispensability under Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 19, Political Question and Act of State, MDC has attempted to fashion new doctrines of antitrust and common law immunity.

The Ninth Circuit reversed the District Court's decision, *in toto*, citing numerous instances where the District Court, contrary to this Court's admonition in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), made findings and conclusions based solely on disputed facts. MDC would have this Court believe that the Ninth Circuit erred by requiring disputed facts to be tried, and that this case presents "questions of exceptional importance." Brief for Petitioner at 2. MDC points to no conflict among the circuits. Its attempt to create an impression that the Ninth Circuit has disregarded Supreme Court antitrust precedent is disingenuous and founded on factual mischaracterizations.

MDC should be held accountable for its breaches of contract, torts, frauds, statutory violations and unconscionable predatory business conduct. The Ninth Circuit correctly remanded this matter to the District Court for completion of discovery and trial on the merits.

II

COUNTERSTATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

During the early and mid-1960's, Northrop foresaw the need for an inexpensive, lightweight, multi-mission fighter/attack aircraft. Northrop committed its best designers and engineers, at a cost of millions of dollars of its own funds, to design an aircraft to meet that need. The design became known as the P-530. Northrop also designed a carrier-suitable derivative of the P-530 called the P-630. The P-530 and P-630 designs incorporated revolutionary aerodynamic configurations and a new concept of engine and airframe integration.

In 1972, the U.S. Air Force ("USAF") solicited proposals from the major American military aerospace contractors for an aircraft design utilizing lightweight fighter ("LWF") technology. MDC elected not to respond, choosing instead to concentrate on its expensive and sophisticated F-15. Northrop's LWF proposal was based on the aerodynamic advancements achieved in its P-530 design program.

On April 14, 1972, the USAF selected Northrop and General Dynamics Corporation ("GD") as the winners of the LWF competition. Each was awarded a contract to produce two flying prototypes to demonstrate LWF technology. Northrop's prototypes were designated YF-17's, and GD's were designated YF-16's.

After testing began on the YF-16 and YF-17 prototypes, the USAF in 1974 decided to conduct the Air Combat Fighter ("ACF") competition to select one of the LWF prototypes for a new lightweight fighter aircraft. As Northrop and GD had built the LWF prototypes, other aircraft manufactures were effectively excluded from the ACF competition.

In mid-1974, the U.S. Navy ("Navy") announced that it would concurrently conduct what became known as the Naval Air Combat Fighter ("NACF") competition to develop a multi-mission aircraft for use aboard aircraft carriers. To take advantage of its prior funding of LWF technology, Congress directed the Navy to limit the NACF competition to proposals based on Northrop's YF-17 and GD's YF-16 technology. Thus, MDC's failure to enter the LWF competition resulted in it being excluded from both the USAF and Navy competitions.

Because GD and Northrop had not been traditional suppliers of carrier-suitable aircraft to the Navy, the Navy asked each company to "team"² for the NACF competition with a company having experience in producing carrier-suitable aircraft for the Navy.³

After determining that Northrop's YF-17 design had technological advantages over GD's YF-16, MDC contacted Northrop in September, 1974 and proposed forming a teaming relationship. To avoid a repetition of what had become known in the military aircraft industry as the "TFX fiasco,"⁴ Northrop suggested that the teaming agreement, within the structure of the team, assign prime contractor responsibilities for YF-17 derivatives along military service lines. MDC concurred, and a preliminary Teaming Agreement was signed by the parties on October 2, 1974.

² Teaming relationships are authorized by Defense Acquisition Regulation 4-117, 32 C.F.R. § 4-117 (1982).

³ The Navy's traditional suppliers were Grumman, LTV, and MDC. Although Northrop possessed the technical proficiency to produce superior carrier-suitable aircraft, Northrop believed that unless it was *perceived* as a contractor with carrier-suitable experience, its NACF proposal was not likely to be considered seriously by the Navy. See, e.g., *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2nd Cir. 1981).

⁴ The TFX aircraft was developed by a single prime contractor to serve both the USAF and the Navy. Because the single prime contractor was never able to resolve conflicting design demands of the two services, the program proved a technical and financial disaster.

In the Teaming Agreement, the parties agreed that Northrop would concentrate on the team's efforts to win the ACF competition while MDC concurrently concentrated on winning the NACF competition.⁵ Pursuant to the agreement, Northrop provided MDC with P-530, P-630 and YF-17 design analysis, test data, design review participation and on-site technical liaison to interpret and apply the data. Contrary to MDC's assertion that Northrop technology was transferred "without restriction," the sole purpose for the technology transfer to MDC was to enable MDC, as a team member with Northrop, to develop, propose and produce "a carrier suitable version of the YF-17 (USN ACF) to satisfy the Navy's . . . requirements."⁶ Brief for Petitioner at 5.

On January 14, 1975, Northrop's proposal lost the ACF competition to GD's F-16. On May 2, 1975, the Navy announced that the Northrop/MDC team's proposal, based on Northrop's technology, had won the NACF competition and would be designated the F-18.

On June 27, 1975, MDC and Northrop entered into a second agreement ("Basic Agreement," amended in 1976) which definitized the relationship of the parties as contemplated by the Teaming Agreement. Like the Teaming Agreement, the Basic Agreement is exclusively a private undertaking to which the Government is not a party. The Basic Agreement provides that the Northrop/MDC team "work together" to develop and produce aircraft derived from Northrop's YF-17 design. As contemplated in the Teaming Agreement, MDC is the prime contractor *for the team* on sales of the carrier-suitable F-18A

⁵ After Northrop and MDC entered into their teaming relationship, GD teamed with LTV for the NACF competition. The United States Government ("Government") was not a party to either teaming agreement.

⁶ Although the Government possessed unlimited rights in YF-17 data and was free to transfer that data to MDC, the fact is that MDC received YF-17 data under license from Northrop, together with substantial Northrop know-how and P-530 and P-630 data in which the Government had no rights. Contrary to MDC's assertions, the Government neither authorized MDC's use of YF-17 data nor disclosed such data to MDC.

weapons system to the Navy and foreign customers, and Northrop is prime contractor *for the team* on sales of F-18's to the USAF and land-based variants of the F-18 to foreign customers, with the other party in each case being a principal subcontractor in the production of the aircraft.⁷

As a result of the Basic Agreement, for the first time in history foreign customers have a choice of different prime contractors for aircraft of the same family. Prior to the Basic Agreement, all modern military aircraft had been made available to customers only on a sole source basis. The Northrop/MDC team was assembled to meet the defense needs of this nation's military services at the Government's suggestion, and introduced heretofore nonexistent competition into the marketplace.

Although Northrop created the business opportunity for the team, MDC thereafter used the data acquired from Northrop and its position as prime contractor on the F-18A to suppress the competition which resulted from the parties' agreements. The Ninth Circuit was understandably impressed with the strength of Northrop's evidence and stated that "the memoranda prepared by top McDonnell executives offer *strong direct evidence* of McDonnell's alleged intent to monopolize" and that the alleged predatory conduct "is clearly conduct 'without legitimate business purpose.'" 705 F.2d at 1058 (emphasis added). MDC's conduct consists of an unlawful campaign to protect sales of its F-15 and to monopolize the market for F-18 aircraft. MDC has engaged in a carefully planned and executed strategy to destroy Northrop as a competitor by employing the following tactics (among others): (1) concerted refusals to deal, (2) commercial disparagement and misrepresentation, (3) interference with Northrop's international F-18 marketing, (4) wrongful economic coercion, (5) systematic breaches of the parties' agreements, and (6) industrial espionage.

⁷ Northrop's land-based version later became widely known as the "F-18L" or "Cobra." MDC's version is known as the "F-18A" or "Hornet."

This Court should therefore deny petitioner's Petition for a Writ of Certiorari.

B. THE DISTRICT COURT'S DECISION.

Northrop filed this action in late 1979 seeking damages and injunctive relief for MDC's alleged (1) breaches of the Basic Agreement, (2) fraud in the inducement of the Teaming Agreement and Basic Agreement, (3) attempt to monopolize the F-18 market, (4) unfair competition, and (5) misappropriation of Northrop's property. In addition, Northrop sought a declaration of the parties' rights and obligations under the Basic Agreement, an accounting of profits earned by MDC and recovery in *quantum meruit* for materials and services provided by Northrop to MDC without compensation. After limited discovery, the District Court dismissed Northrop's First Amended Complaint in its entirety and alternatively granted MDC summary judgment on five of Northrop's eight claims.⁸

The reasoning behind the District Court's entry of summary judgment on the parties' antitrust claims is a model of inconsistency, premised on hotly disputed material facts as to the competitive characteristics of the military aircraft industry, the relationship between Northrop and MDC, the economic effect of the prime contractor role in the military sales context, and on a misapplication of the *per se* rule. On the one hand, the District Court held there was insufficient trade or commerce to support a Section 2 claim. On the other hand, the court held that the assignment of prime contractor responsibilities in the Basic Agreement is a *per se* violation of Section 1 of the Sherman Act.⁹ *Northrop Corp. v. McDonnell Douglas Corp.*, 498 F.Supp. 1112, 1123 (C.D.Cal. 1980), *rev'd*, 705 F.2d 1030 (1983). The District Court did not explain how trade could be restrained if there was no trade or commerce among the states or with foreign nations.

⁸ At the time of the District Court's ruling, discovery was being conducted but remained incomplete. For example, Northrop has not had an opportunity to obtain or review internal MDC documents relating to the marketing of MDC's F-15 aircraft, which it was attempting to protect from competition with the F-18L.

⁹ Sherman Antitrust Act, 15 U.S.C. §1 (1976).

In addition to its antitrust rulings, the District Court decided that all of Northrop's claims were barred by the Political Question Doctrine because they raised non-justiciable "political issues," that would force the court to become the "super-procurer and sales licensor" of the F-18 weapons system. *Id.* at 1120. The District Court also held that Northrop's claims were barred by the Act of State Doctrine by accepting as true MDC's unsubstantiated assertion that the court would have to inquire into the minds of foreign governments to establish that Northrop suffered injury as a result of MDC's conduct. *Id.* at 1121.

Lastly, the District Court dismissed Northrop's claims because it found that the Government was an indispensable party under Fed. R. Civ. P. 19. This determination was based on the court's erroneous belief that Northrop's claims "called into question" the Government's "unlimited rights" ¹⁰ in F-18 technical data and would prohibit the Government from procuring non-carrier-suitable F-18 aircraft from MDC. *Id.* at 1117.

C. THE COURT OF APPEALS' DECISION.

The Ninth Circuit's reversal of the District Court on the Political Question, Act of State and Rule 19 issues was based on a better understanding of the relief requested by Northrop. The Ninth Circuit recognized that the relief requested by Northrop (1) does not require that a court "challenge the wisdom or legality of any governmental act or decision" or result in the "direct interjection of the judiciary into the Government's procurement activity," 705 F.2d at 1047, (2) would not "necessitate direct judicial inquiry into [the procurement] decisions" of foreign governments, *Id.* at 1048, (3) would not affect the Government's unlimited rights in F-18

¹⁰ "Unlimited Rights" are defined in Defense Acquisition Regulation 9-201(d), 32 C.F.R. § 9-201(d) (1982), as the "rights to use, duplicate, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." See also Defense Acquisition Regulation 7-104.9(a), 32 C.F.R. § 7-104.9(a).

technical data, *Id.* at 1044, and (4) would not bar the Government from offering F-18 work to any contractor, or preclude any contractor, including MDC, from accepting such work. *Id.* at 1045.

The Ninth Circuit found that this case presents "novel antitrust considerations" warranting rule of reason analysis. *Id.* at 1051. The court's decision was based on two principal grounds. First, the court recognized that the military aircraft industry, and more particularly military teaming agreements, have never received judicial scrutiny. The Ninth Circuit followed this Court's admonitions in *Broadcast Music, Inc., v. Columbia Broadcasting System*, 441 U.S. 1 (1979), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), against the overly simplistic characterization of a questioned restraint. Second, the court was impressed with the fact that the parties' agreements "foster competition by allowing both parties to compete in a market from which they were otherwise foreclosed." 705 F.2d at 1052-53. The court recognized that competition between the F-18A and F-18L is a "surprisingly pro-competitive occurrence in an industry typified by single source products." *Id.* at 1052.

III

REASONS FOR DENYING THE REQUESTED WRIT

A. TEAMING AGREEMENTS AND RECIPROCAL ASSIGNMENT OF PRIME CONTRACTOR ROLES IN THE MILITARY AIRCRAFT INDUSTRY HAVE NEVER BEEN SUBJECTED TO ANTITRUST SCRUTINY AND MERIT RULE OF REASON ANALYSIS.

1. *The Assignment Of Reciprocal Prime Contractor Responsibilities Is Pro-Competitive And Is Not A Market Division.*

MDC contends that the declaratory and injunctive relief sought by Northrop would transform the Basic Agreement into a contract by horizontal competitors to divide the world market

for F-18 aircraft between them, the USAF and non-carrier-suitable F-18 aircraft market to Northrop and the Navy and carrier-suitable F-18 aircraft market to MDC.¹¹ It then asserts that the simple question before this Court is whether such a "horizontal market" division between military contractors is illegal *per se* under Section 1 of the Sherman Act.

Seemingly attractive in their simplicity, MDC's assertions completely mischaracterize the nature of the relationship established by the parties' agreements. Under the Basic Agreement, the parties agreed to work together *as a team* to design, develop, produce and market military aircraft derived from Northrop's technology and YF-17 design. The party that is prime contractor on a particular configuration performs 60% of the work on the aircraft. The other party as principal subcontractor performs 40% of the work involved in production of the aircraft. Only the respective roles of prime contractor and subcontractor were expected to vary depending upon whether the customer, foreign or domestic, desired a carrier-suitable or land-based aircraft.¹² As discussed earlier, the shifting of prime contractor responsibilities within the team was intended to assist the team in meeting conflicting customer requirements for the team's one product—the F-18 weapons system.

In the past, teaming relationships between military contractors have traditionally designated one party, the party developing the original technology, as the prime contractor on

¹¹ MDC alternatively characterizes the Basic Agreement as an allocation of customers rather than a division of markets. MDC contends that the Basic Agreement as construed by Northrop divides customers on "product specific bases" with MDC being allowed to market its product to customers having a need for carrier-suitable aircraft. Brief for Petitioner at 7. MDC at least implies that such customers are limited to countries possessing aircraft carriers. MDC's own Petition, however, identifies three countries, Canada, Spain and Australia, that do not possess aircraft carriers but have nonetheless purchased the carrier-suitable F-18A with MDC serving as prime contractor on behalf of the team. *Id.* at 1-2.

¹² The prime contractor, in addition to producing those segments of the aircraft for which it has design responsibility, also stands in privity of contract with the customer, markets the aircraft, designates subcontractors on its portion of the work and performs final assembly of the aircraft.

all sales of the team's product. The Northrop/MDC teaming relationship is the first teaming relationship in U.S. military history that allows both parties to compete for sales of the team's product. The Northrop/MDC teaming relationship is therefore uniquely pro-competitive because it allows MDC and Northrop to market F-18 aircraft of different configurations in head-to-head competition with each other.

MDC's mischaracterization of the Basic Agreement as a run-of-the-mill horizontal market division is based on the false premise that Northrop and MDC were at all times horizontal, active competitors, each capable of competing, one against the other, for the manufacture and sale of aircraft designed to satisfy the Navy's NACF requirements. Prior to the parties' teaming relationship, the USAF limited its ACF competition to Northrop and GD, and Congress limited participation in the NACF competition to proposals based on proprietary Northrop and GD LWF technology. MDC was, therefore, not an actual or potential competitor of Northrop's for the sale of YF-17 or F-18 aircraft, or their derivatives, at the time the teaming relationship was established.

If it had not teamed with Northrop, MDC would not be producing F-18 aircraft for use by the Navy or foreign customers. MDC, foreclosed from the market by Congressional directive and its own failure to enter the LWF competition, reluctantly concluded that a teaming relationship with Northrop or GD:

"was the only crap game in town, so we had to play it . . . *The Navy wasn't going to let us prepare our own airplane and win with it, so we had to go their way.*" (emphasis added). 705 F.2d at 1037 n.2.

Although MDC's only option was to team, Northrop had a number of alternatives. Northrop could have ignored the Navy's teaming suggestion and attempted to win the competition by itself.¹³ It could have declined to participate in the

¹³ In light of the Navy's predisposition to deal only with contractors possessing carrier-suitable experience, a serious question remains whether the Navy would have awarded a contract to Northrop alone. See *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981). See *supra* note 6.

NACF competition in favor of devoting all its efforts to the ACF competition. Alternatively, Northrop could have teamed with a traditional Navy contractor while limiting its teaming partner to being a principal subcontractor on the Navy aircraft with Northrop retaining all prime contractor responsibilities, including all foreign and domestic marketing.¹⁴ Each of those alternatives would have been lawful. None, however, would have added a new competitor to the market.

The Northrop/MDC teaming relationship with its shifting assignment of prime contractor and subcontractor responsibilities created competition in an industry characterized by market concentration and significant barriers to entry. See *Grumman Corp.*, 665 F.2d at 12. As the Ninth Circuit noted:

"[B]ut for the teaming effort General Dynamics and other manufacturers of aircraft fitting the same general buyer needs as the F-18 would have had neither F-18 variant to compete against. Thus, not only do the agreements not preclude all competition between the parties' respective variants of the F-18, they actually foster competition by allowing both parties to compete in a market from which they were otherwise foreclosed." 705 F.2d at 1052-53.

2. The Teaming Relationship And Assignment Of Prime Contractor Responsibilities Are Previously Unexamined Business Practices In A Unique Industry.

Per se treatment has been reserved for those business practices that are so "plainly anticompetitive", *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), and so "lack . . . any redeeming virtue," *Northern*

¹⁴ Although the Navy suggested that Northrop and GD each team with a contractor having experience designing and producing carrier-suitable aircraft, the Navy did not require that the teaming partner be the prime contractor on sales to the Navy. The GD/LTV teaming agreement provided that if GD's YF-16 proposal in the ACF competition was not selected by the USAF and LTV's YF-16 proposal in the NACF was selected by the Navy, GD was to be the prime contractor on all sales of YF-16 derivatives to the Navy.

Pacific Railway v. United States, 356 U.S. 1, 5 (1958), that they are presumed to be unlawful without inquiry as to their competitive effects. It is not until the judiciary has "experience with a particular kind of restraint [that] enables the Court to predict with confidence that the rule of reason will condemn it . . ." that *per se* treatment is applied. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982). Although the reciprocal assignment of prime contractor responsibilities in the Basic Agreement is pro-competitive, MDC argues that this Court should condemn it as illegal *per se* because shifting prime contractor responsibilities within a team can be simplistically characterized as a market division or allocation of customers.

Such overly simplistic and literal characterizations have been routinely criticized. In *Broadcast Music*, this Court determined that before extending *per se* treatment to an unexamined business practice, the courts must determine whether the:

"practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" 441 U.S. at 19-20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

Applying this standard, the Court held that a blanket licensing system of musical compositions, challenged by the plaintiff as unlawful *per se* horizontal price fixing, required rule of reason analysis. This was because without the questioned licensing system, the producers of musical compositions could not have effectively marketed their product to radio broadcasters. In such a case, the *Broadcast Music* Court preferred to rely on "demonstrable economic effect rather than . . . formalistic line drawing" in determining the challenged practice's legality. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977).

But for the teaming relationship established by Northrop and MDC, it would have been difficult, if not impossible, for Northrop to have won the NACF competition. MDC alone could not even have entered the competition. Without the teaming relationship, a derivative of Northrop's YF-17 might never have reached the marketplace. The Ninth Circuit was therefore correct in finding that, pursuant to *Broadcast Music*, the teaming relationship warrants rule of reason analysis because it was necessary to bring the team's product to market.¹⁵

The Ninth Circuit was also correct in holding that the courts lack sufficient experience with both the challenged practice and industry in question to warrant the imposition of the *per se* rule. Teaming arrangements are a unique business practice used in the development and production of complex, high technology, military and aerospace hardware. Neither weapons system teaming agreements, nor the shifting of prime contractor responsibilities between team members in a complex defense procurement, has ever been subject to judicial scrutiny under the antitrust laws. *Per se* treatment, reserved for those particular forms of economic activity that have proven themselves to be "manifestly anticompetitive," *Continental T.V., Inc.*, 433 U.S. at 49-50, and without a "purpose [other than] stifling . . . competition," is therefore inappropriate in the instant action. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).¹⁶

The case law cited by MDC is inapposite. *United States v. Topco Associates*, 405 U.S. 596 (1972), involved a market division among *actual* horizontal competitors that eliminated actual and potential competition in the sale of private label food products. The territorial restrictions in *Topco* were completely unrelated to the basic purpose of the joint under-

¹⁵ The logical extension of MDC's argument is that *Broadcast Music* was wrongly decided and should be overruled.

¹⁶ Where, as here, the prime-sub relationship is clearly lawful, the shifting of the prime-sub relationship for allocative efficiency reasons is also lawful. Calling the relationship a market or customer division is labelism at its worst. It is not analysis. The assignment of roles within the prime-sub unit does not raise the antitrust concerns postulated by MDC.

taking. There, the purpose was to provide private label food products to small grocery stores so they could compete with the national supermarket chains. As discussed *supra*, MDC was not an actual or potential competitor of Northrop, but was foreclosed from entering the NACF and ACF competitions and *could not have been* a competitor for sales of F-18 aircraft. Moreover, the assignment of prime contractor responsibilities, designed to eliminate conflicting demands by the team's customers, was integrally related to the purpose of forming the team.

MDC also contends that the Ninth Circuit's decision is inconsistent with this Court's decisions in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam), and *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Those cases are easily distinguishable. *Catalano* and *Maricopa* involved blatant price fixing agreements governed by this Court's holding in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Neither required in-depth analysis of their economic purpose or effect. This Court expressly noted in *Maricopa County* that its decision:

"should not be confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule of reason experience with the particular type of restraint challenged." 457 U.S. at 349 n.19.

3. The Prime Contractor Responsibility Clause In The Basic Agreement Is An Integral Part Of A License From Northrop To MDC Of Proprietary, Technical Data And Know-How.

The teaming relationship before the Court, like the blanket licensing system in *Broadcast Music*, is a novel business practice being utilized for pro-competitive reasons. The agreements between the parties must therefore be examined for their purpose and effect. Such an analysis will show that the agreements effected a transfer to MDC of valuable, proprietary YF-17, P-530 and P-630 know-how and technical design data

otherwise unavailable to MDC. The accompanying use limitation assigned MDC prime contractor responsibilities for the sale and production of carrier-suitable F-18 aircraft on behalf of the team.

Reasonable use limitations may be employed by a licensor of technology. In *A&E Plastik Pak Co. v. Monsanto Co.*, 396 F.2d 710, 715 (9th Cir. 1968), the court stated:

"[S]o long as restraints are imposed solely upon their know-how licensees who have not discovered and cannot easily obtain the technology for themselves, the restraints should be valid, if reasonable."

The assignment of prime contractor roles in the Basic Agreement is reasonable. It does not have the purpose or effect of limiting competition. Indeed, in the absence of the parties' agreements, the NACF competition was restricted by congressional mandate to two companies, Northrop and GD. Under the parties' agreements, a third company was given access to the competition and infused with proprietary LWF technology. The role assignments are not "naked restraints" of trade designed to stifle competition and should be upheld as lawful. See *White Motor Co. v. United States*, 372 U.S. 253 (1963).

B. THE GOVERNMENT IS NOT INDISPENSABLE AND MDC IS ACCOUNTABLE FOR ITS UNLAWFUL CONDUCT.

The assertion by MDC that the Government is an indispensable party to this litigation is a thinly veiled attempt to use Fed.R.Civ.P. 19 in conjunction with the Doctrine of Sovereign Immunity to shield itself from liability for otherwise indefensible predatory business conduct. In analogous situations, courts have routinely litigated claims without requiring the presence of the Government. MDC's argument leaves government contractors totally unaccountable for any breach of a duty to a fellow contractor.

The claims made by MDC are unsupported by case law. Courts have routinely adjudicated contract disputes between teaming partners in the military procurement industry, e.g., *Experimental Engineering, Inc. v. United Technologies Corp.*, 614 F.2d 1244 (9th Cir. 1980); *Air Technology Corp. v. General Electric Co.*, 347 Mass. 613, 199 N.E.2d 538 (1964), and disputes between prime contractor and subcontractor, e.g., *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961), without requiring the presence of the Government in the action. The courts have specifically rejected suggestions that the Government is an indispensable party to contract and tort claims against federal prime contractors. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 F.2d 328 (4th Cir.), cert. denied, 349 U.S. 956 (1955).

No court has ever held that a purchaser of a product is an indispensable party to an action brought to adjudicate claims of monopolization, breach of contract, unjust enrichment or unfair competition between suppliers. A person not a party to a commercial contract is not a necessary party to an adjudication of rights under the contract. This is so even though the individual will be affected by the outcome of the litigation. 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1613 (1972). See, e.g., *Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc.*, 564 F.2d 816 (8th Cir. 1977); *Trans Pacific Corp. v. South Seas Enterprises, Ltd.*, 291 F.2d 435 (9th Cir. 1961).

The Ninth Circuit's holding that the Government is not a necessary party, much less an indispensable party, to this litigation is well reasoned and supported by the record.¹⁷ The

¹⁷ Although MDC did not argue in the Ninth Circuit that complete relief cannot be granted between Northrop and MDC without the presence of the Government, it now asserts that the Ninth Circuit erred because it found that *meaningful* relief could be fashioned by the District Court. MDC is playing with words. In making its determination, the Ninth Circuit expressly recognized that Fed.R.Civ.P. 19(a)(i) requires that a court be able to provide "*consummate* rather than partial or hollow relief" to the parties. 705 F.2d at 1043 (emphasis added). Thus, the Ninth Circuit did indeed find that complete relief can be granted between the parties.

threshold question under Rule 19 is whether the party to be joined "claims an interest relating to the subject matter of the action. . . ." Fed.R.Civ.P. 19. Subparts (19)(a)(i) and (19)(a)(ii) are contingent upon the requirement that the missing party have a legally protected interest. Cf., *Central Council of Tlingit & Haida Indians of Alaska v. Chugach Native Association*, 502 F.2d 1323 (9th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). The Ninth Circuit properly found that the Government neither claims nor has any interest in this litigation.

MDC argues that the Ninth Circuit assumed the Government does not claim an interest in the subject matter of the action because of its absence from the lawsuit. That assertion is a complete fabrication. As the Ninth Circuit correctly noted, the Government has not only never asserted a formal interest in the action, but has specifically "declared its intent to respect the teaming relationship, and has consistently advised the parties to resolve their disagreements in accordance with law and their private agreements." 705 F.2d at 1044.

Despite the Government's disavowal of interest, MDC argues that Northrop's requested relief challenges the Government's rights in the data and technology arising from the development of the F-18 weapons system. It argues that the Government is therefore a necessary party to the litigation. Petitioner's argument has no merit. Northrop recognizes that the Government's rights in F-18 data are unlimited. In the District Court, Northrop expressly stated:

"If the Government . . . goes to McDonnell and says 'we have unlimited rights in this data and taking those unlimited rights and giving them to you, we want you to do this,' the Government is free to do that. They can go to Grumman, they can go to Lockheed. They have unlimited rights. That is not anything we are contesting here." *Id.* at 1045.

The Government's "unlimited rights" in the technology used to design major weapons systems are *not exclusive*. The contractor developing the technology retains the right to transfer such data under license to private contractors. The Ninth Circuit stated:

"The Government's rights in that [YF-17] data, although unlimited, were neither sole nor exclusive and did not divest Northrop of the residual right to continue to use the technology itself and to share it with other private parties. *See Regents of University of Colorado v. K.D.I. Precision Products, Inc.*, 488 F.2d 261, 264 (10th Cir. 1973) (interpreting language identical to that in 32 C.F.R. § 7-104.9(a)). . . ." 705 F.2d 1044-45.¹⁸

MDC also argues that if Northrop obtained the relief requested and the Government placed an order for non-carrier-suitable F-18 aircraft with MDC, the Government would be impacted by increased costs resulting from the loss of MDC production efficiencies or through the payment of damages and that MDC would be subject to inconsistent obligations, thus interfering with the Government's military procurement objectives. MDC's assertions are again unsupported. Northrop has only requested relief that would prohibit MDC from committing predatory acts prior to receiving an order for F-18 aircraft from a customer, and a declaration of MDC's obligations under its business agreements with Northrop. If the Government places an order for non-carrier-suitable F-18 aircraft with MDC in the future, MDC would be free to respond, subject to obligations owed to third parties under antecedent agreements.¹⁹

¹⁸ MDC, by its contemporaneous conduct, agrees with this principle as it relates to the F-18A. MDC argued below that "*McDonnell owns* all technical data related to the F-18 and the Government has unlimited rights in such data." (emphasis added). In fact, the record shows that MDC has offered to license others F-18A data.

¹⁹ MDC contends that it would be subject to inconsistent obligations if Northrop received the relief requested and the Government directed MDC to eliminate the carrier suitability features of the F-18A pursuant to the "Changes Clause" in its prime contract with the Navy. The existence of a changes clause does not allow a private party to avoid prior contractual obligations with other parties. *See Westinghouse Electric Corp. v. Garrett Corp.*, 437 F.Supp. 1301, 1338 (D.Md. 1977), *aff'd*, 601 F.2d 155 (4th Cir. 1979).

The Ninth Circuit found that MDC's arguments are also flawed because they are based on the hypothetical assumptions that the Government will someday order non-carrier-suitable F-18 aircraft from MDC and that MDC will refuse to provide the Government with the requested weapons system configuration. Mere speculation that a third party in the future might take a position inconsistent with relief granted by the court does not render that third party an indispensable party under Rule 19. *Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102 (4th Cir. 1980); *Arthur v. Starrett City Associates*, 89 F.R.D. 542 (E.D.N.Y. 1981).

MDC's arguments are not only speculative, they are also based on the false premise that the Government has an "enforceable expectation" that a particular contractor will be responsive to its procurement preferences, regardless of the contractor's prior contractual commitments. 705 F.2d at 1045. No customer has an enforceable expectation that a supplier will be willing and able to supply it with a product, or a product at a given price, until a sales contract is consummated. As MDC management consistently testified, the Government has no more right to demand that MDC produce a product for it than a customer in a normal commercial context.²⁰ MDC is as free to reject an order as the Government is to offer it to another contractor. The Ninth Circuit properly found that the Government's "hypothetical interest" in obtaining non-carrier-suitable F-18 aircraft from the Northrop/MDC team with MDC as prime contractor does not warrant an exception to the general rule that a person not a party to a contract is not a necessary party to an adjudication of rights under the contract. *Id.* at 1046.

²⁰ As the Ninth Circuit recognized, there are any number of reasons why a military contractor, like a commercial supplier, might elect not to accept a purchase order directed to it by a customer. For example, a contractor might face plant capacity constraints or labor problems preventing it from accepting a Government order. MDC might have previously committed a significant portion of its capacity to the production of DC-9 and DC-10 airliners for its civil aviation customers. If the Government placed an F-18 order with MDC and MDC unilaterally, and for greater profit, breached its antecedent agreements with its civil aviation customers to fill the Government's order, the Government would surely not be an indispensable party in an action brought by MDC's DC-9 and DC-10 customers for damages.

This Court should not be misled by MDC's claim that because the Government is involved in military weapons procurement, breaches of private agreements in a military sales context differ from those in a strictly commercial context. MDC's reasoning would effectively immunize the nation's military procurement industry from claims resulting from breaches of contract and tortious conduct. As weapons development has become more complex and costly, teaming agreements have been used more and more frequently. This Court should not permit defense contractors to use Rule 19 in conjunction with the Doctrine of Sovereign Immunity as a license to breach duties and obligations owed their teaming partners.

C. THE COURTS ARE NOT PRECLUDED BY THE POLITICAL QUESTION AND ACT OF STATE DOCTRINES FROM ADJUDICATING NORTHROP'S PRIVATE BUSINESS DISPUTE WITH MDC.

1. Prior Applications Of The Political Question Doctrine Demonstrate That This Case Does Not Involve A Non-Justiciable Political Question.

MDC argues that under the Political Question Doctrine delineated in *Baker v. Carr*, 369 U.S. 186 (1962), and applied in *Gilligan v. Morgan*, 413 U.S. 1 (1973), the courts are precluded from adjudicating Northrop's claims against MDC. MDC argues that this action involves military aircraft purchases under the control of the Government and that its predatory conduct is therefore insulated from adjudication by the courts. However, the conduct complained of here did not involve governmental action, decision making or approval. Disputes involving predatory business conduct directed against a competitor are customarily adjudicated by the courts.

The Political Question Doctrine has its origins in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). However, it was not until *Baker v. Carr* that the Court established a six-pronged

test to be used by the judiciary to determine whether an issue before it is a non-justiciable "political question." In *Baker v. Carr*, the Court stated that:

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

Thus, "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures. . . ." *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961). Courts have refused to decide questions such as the legality of a war, *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973), boundary disputes between countries, *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (D.C. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), and the legitimacy of a newly elected state government in Rhode Island. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). The common thread among the cases is that an adjudication of the disputes giving rise to the actions would have forced the courts to become involved in sensitive political issues, thus violating the principles of Separation of Powers and Federalism so important to this nation's political heritage and stability. No such issues are now before this Court.

2. Northrop Seeks No Relief That Would Involve The Judiciary In Military Procurement Decisions.

As discussed earlier, the District Court's invocation of the Political Question Doctrine was premised on its mistaken belief that Northrop seeks a declaration stating from whom the

Government must purchase the F-18 weapons system. Similarly, MDC contends that Northrop is asking the judiciary to become involved in the process of equipping the U.S. military, as was the plaintiff in *Gilligan*, 413 U.S. 1. In *Gilligan*, the plaintiff sought "judicial evaluation of the 'training, weaponry and orders' of the Ohio National Guard" and judicial control in the future over those same facets of the Guard's operations. *Id.* at 5-6. Relief that would involve the judiciary in the evaluation or supervision of military procurement decisions is simply not being sought by Northrop.

In this case, Northrop seeks relief from MDC's private tortious business conduct committed without Government authorization or direction. Northrop has not challenged the propriety or legality of any governmental decision. The Ninth Circuit therefore correctly concluded that "the issues presented for trial are not political questions—they are legal issues, involving private commercial activity which the judiciary is uniquely equipped to resolve." 705 F.2d at 1047.

3. *The Claims Asserted By Northrop Would Not Require Inquiry Into The Acts Of A Foreign Government And Are Therefore Not Barred By The Act Of State Doctrine.*

As stated in *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir. 1982), "the act of state doctrine is a policy of judicial abstention from inquiry into the validity of an act by a foreign states. . . ." See also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). The Doctrine is designed to avoid judicial action in areas which would embarrass the Legislative or Executive branches of the Government, or hinder the foreign policy of the United States. *International Association of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The Legislative and Executive branches of government have been found to be "better equipped to resolve a politically sensitive question." *Id.* at 1358.

The Act of State doctrine is, however, not jurisdictional and the defendant asserting it as an affirmative defense bears the burden of establishing the necessity for judicial deference. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). Absent a strong showing by the defendant, the Doctrine will not be applied to thwart legitimate regulatory goals. *Curtiss-Wright Corp.*, 694 F.2d at 304. The Doctrine requires a factually based examination into the possible effect of judicial inquiry on the foreign relations of the United States, the threat to free competition posed by the alleged conduct and the relative importance of the conduct performed in the United States to the alleged violations. *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).²¹

There is nothing in the record to support a dismissal of Northrop's claims pursuant to Fed.R.Civ.P. 12(b). The relief requested by Northrop would not require a court to question the validity of any act of a foreign government or require a court to "sit in judgment on the acts" of a foreign country. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

MDC argues that the Act of State Doctrine bars Northrop's claims because Northrop must show that "its business was damaged as a result of . . . [the] decisions of foreign states not to purchase an F-18L . . ." Brief for Petitioner at 21. This is not so. Damages suffered by Northrop as a result of MDC's predatory conduct may be established by any number of methods. For example, the Ninth Circuit correctly noted that Northrop's claim for damages resulting from duplicating data and technology that MDC wrongfully refused to provide Northrop would not require judicial inquiry into the minds of any foreign government.

²¹ As stated in *Timberlane*: "It is apparent that the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." 549 F.2d at 606.

D. THE ROLE OF THE GOVERNMENT IN THE MILITARY PROCUREMENT INDUSTRY DOES NOT NEGATE MDC'S ACCOUNTABILITY FOR EXCLUDING COMPETITION IN VIOLATION OF THE ANTITRUST LAWS.

1. Competition Among Military Contractors Will Result In Lower Costs To The Government For Military Equipment.

In the hope of avoiding a trial on the merits, MDC argues that even if MDC breached its agreements with Northrop and committed the predatory conduct alleged in the First Amended Complaint, the Government exercises such control over the production and marketing of advanced aircraft that "no seller of an advanced air weapons systems can attain monopoly power" that can be used to raise prices.²² Brief for Petitioner at 24. MDC's argument is sophistry. While the Government is the sole source of domestic demand for military goods, it does not control the number of available suppliers. Competition among suppliers for a sale is just as important an ingredient in holding costs down in the military aircraft industry as it is in a normal commercial context.

The District Court in granting MDC's motion for summary judgment assumed as a factual matter that the Government exercises such "absolute and over-riding control" that no monopoly was threatened. 498 F. Supp. at 1123. The Ninth Circuit in reviewing the District Court's decision correctly noted:

"The record does not indicate as a matter of law that the military aircraft industry enjoys some sort of natural monopoly that renders inapplicable the premise of the antitrust laws that competition will assure the consumer the best product at the lowest price." 705 F.2d at 1055.

²² MDC's "monopsonist" argument is at best incomplete, inaccurate and misleading. The Government is well aware of the importance of preserving competition in the weapons industry. See, e.g., Defense Acquisition Regulation 4-117, 32 C.F.R. § 4-117 (1982); Grumman Corp. v. LTV Corp., 665 F.2d 10 (2d. Cir. 1981).

The Ninth Circuit is correct.²³ The Government in implementing its procurement policies has consistently recognized the many advantages of competition between suppliers for Government contracts. This Court need look no further for an example of the Government's interest in competition among suppliers than the LWF, ACF and NACF competitions.

As for foreign sales of major weapons systems, the Government simply plays the role of export traffic manager. As with all commercial products, it makes a determination as to what products can be exported to what countries consistent with U.S. foreign policy. The Government then allows the foreign government to choose freely the product it will purchase from those items approved for export. Private American military contractors thereafter compete among themselves and with their foreign counterparts by delivering a better product at a lower price. The foreign governments benefit from such competition accordingly.

2. Military Contractors Engaging In Predatory Business Conduct Are Not Immune From Claims Under The Sherman Act.

MDC contends that because the Government is the only domestic purchaser of military aircraft, a seller of such aircraft cannot obtain monopoly power. The necessary implication

²³ If MDC were correct, no conduct engaged in by a government contractor would ever raise antitrust concern. By such analysis, an entire body of case law, ignored by MDC, would be a series of idle acts and erroneous advisory opinions. Courts have considered a number of cases arising in the defense industry where the Government was the sole purchaser. The antitrust laws were held applicable. *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300 (3rd Cir. 1982) (military aircraft engines); *Grumman Corp. v. LTV Corp.*, 665 F.2d 10 (2d Cir. 1981) (carrier-suitable aircraft); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) (ammonium perchlorate for missiles); *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C.Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969) (U.S.-financed shipping); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961) (government sole purchaser of uranium ore), *cert. dismissed sub nom. Wade v. Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962); *American Standard, Inc. v. Bendix Corp.*, 487 F.Supp. 265 (W.D.Mo. 1980) (specialized communications gear for military aircraft); *Ovitron Corp. v. General Motors Corp.*, 295 F.Supp. 373 (S.D.N.Y. 1969) (Army field radios).

arising from this contention is that military contractors are forever immune from Section 2 Sherman Act claims arising out of their predatory business conduct. Antitrust immunities are, however, strongly disfavored and will be recognized only when expressly granted by statute or where plain repugnancy exists between the Sherman Act and federal regulation. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Extensive regulation of an industry does not alone confer blanket immunity on predatory business conduct in the regulated industry. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

Applying the standard set forth in *Philadelphia National Bank* and *Otter Tail*, predatory conduct in the military aircraft industry does not enjoy either express or implied immunity. Congress intended the antitrust laws to apply to private conduct in the industry. The Armed Services Procurement Act of 1947, 10 U.S.C. 2305(d) (1976), provides that whenever a military procurement agency believes that a "violation of the antitrust laws" has been committed in connection with a military procurement contract, the procuring agency must notify the Attorney General of the United States of the violation. Additionally, International Traffic in Arms Regulation 124.11(d), 22 C.F.R. § 124.11(d) (1983), promulgated under the International Security Assistance and Arms Export Control Act of 1976, 22 U.S.C. 2751 *et seq.*, provides that licensing approval by the Office of Munitions Control of agreements for foreign manufacturing and technical assistance is not to be interpreted as "passing on the legality of the agreement from the standpoint of antitrust laws. . . ." The laws governing the sale of military hardware do not immunize military contractors competing for foreign or domestic sales from antitrust liability. Rather, they affirm the Government's interest in the efficiency goals associated with the Sherman Act and the preservation of free competition.²⁴

²⁴ When not posturing before this Court, MDC readily admits its monopoly power in the F-18 market, and its motive for excluding Northrop. A MDC Corporate Vice-President testified that MDC strove to keep tooling away from Northrop so that it could maintain its position as a "sole source," which "means that your subsequent contract awards are negotiated and not competitively arrived at . . . It's a desirable situation . . . You don't have to recompetete for it again and again and again . . ." (emphasis added).

3. *The Ninth Circuit Found That There Was Sufficient Evidence Of Dangerous Probability Of Monopolization To Preclude Summary Judgment.*

In an effort to create a controversy where none exists, MDC asks this Court to decide whether dangerous probability of monopolization must be proven in all monopolization cases or whether it can be inferred from specific intent or dispensed with altogether. Had the Ninth Circuit relied on its decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), that issue might be before this Court. The Ninth Circuit in this case, however, expressly found that "there was sufficient evidence of McDonnell's probability of success [of monopolization] to avoid summary judgment." 705 F.2d at 1058. The court did not infer dangerous probability of monopolization from the mountain of intent evidence before it, or dispense with the requirement. Rather, the court decided for the reasons discussed above that monopoly power and its associated evils can be achieved in the military aircraft industry through predatory business conduct.

IV

CONCLUSION

The respondent respectfully asks this Court to deny MDC's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit for the reasons set forth in this Brief.

Respectfully submitted,

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

NORTHROP CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Ninth Circuit

**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

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INTRODUCTION

This reply addresses matters raised by Northrop in its Brief in Opposition ("Opposition"). While Northrop contends there are genuine issues of material fact, it identifies *none* that are necessary to decide the Questions Presented in McDonnell's Petition for Writ of Certiorari ("Petition"). Those Questions Presented are now ripe for determination and are not dependent upon the resolution of any disputed material facts.

REPLY

A. Northrop Seeks Relief To Foreclose Competition Between Northrop And McDonnell, Not To Foster It.

Northrop claims that McDonnell has "mischaracterized" the *nature* of the relationship established by the 1975 Basic Agree-

ment, which Northrop now euphemistically calls "a reciprocal assignment of prime contractor responsibilities." (Opposition, p. 13). Northrop contends that, as such, it is not a blatant *per se* violation of the antitrust laws, but instead is pro-competitive.

Northrop cannot, however, deny the immutable fact of this litigation, the claims it has made or the relief it has sought based on its construction of the Basic Agreement. The euphemistic labelling cannot hide the unambiguous and unequivocal market division Northrop's Amended Complaint seeks to enforce.

Northrop seeks to preclude McDonnell from offering to sell, selling or producing:

- (a) *any configuration of the F-18 (whether "land-based" or "carrier-suitable") for the United States Air Force, claiming that customer as its sole domain;*² and

¹ Northrop's present view of the Basic Agreement as a 60/40 "reciprocal" assignment of prime contract and subcontract responsibilities is contrary to its position in the District Court. There, one of its senior officers testified in his deposition:

McDonnell had no existing right [under the Basic Agreement to share in prime contracts obtained by Northrop]. . . . Northrop did have a right [to share in McDonnell's contracts] which is clearly stated in the Basic Agreement. (Gonzalez Dep. at p. 354.)

² As a Northrop Vice President succinctly testified in his deposition:

[McDonnell's Counsel]: *There was an agreement that those customers would be divided, the Air Force—*

[Northrop's Vice President]: *— Along the lines of the Teaming Agreement, that is what I recall was the statement or thereabouts.*

[McDonnell's Counsel]: . . . [T]hat meant Northrop would have the exclusive right to sell the F-18 to the Air Force, and that McDonnell would have the exclusive right to sell the F-18 to the Navy?

[Northrop's Vice President]: Yes. (J. Jones Dep. at 417.)

- (b) *any* non-carrier suitable F-18 or any F-18 which differs from the Navy configuration.³

This market division is no previously "unexamined business practice" which requires rule-of-reason analysis. While the Ninth Circuit panel may have been impressed by Northrop's new label, this Court should recognize that it is the same old wine: a *per se* illegal effort by Northrop to prevent McDonnell from selling F-18's to the same customers to which Northrop seeks to sell them.

Northrop vainly attempts to justify this market division by contending that it was necessary to create competition where none previously existed, and that it now enables Northrop and McDonnell to compete "head-to-head" in the sale of F-18's. There are several patent untruths in this argument.

First, the Basic Agreement as Northrop construes it does not foster competition.⁴ No "in-depth analysis of [its] economic purpose or effect" (Opposition, p. 15) is required. Under it, McDonnell could not sell F-18's to the Air Force, and Northrop could not sell F-18's to the Navy; and McDonnell could not sell "land-based" F-18's, and Northrop could not sell "carrier-suitable" F-18's. (Opposition, pp. 5-6.) Thus, Northrop's construction of the Basic Agreement is one that "would always or almost always tend to restrict competition . . ." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S.

³ Northrop believed such limitations on configurations would assure it the foreign market, since, as Northrop stated in a Jan. 5, 1979 internal memorandum, "it is a practical impossibility for any foreign sale to be made on the basis of the exact configuration being purchased by the Navy." As a Northrop Vice President stated in a Jan. 3, 1978 internal memorandum to Northrop's Chairman: "If [McDonnell] was forced to limit itself strictly to what the Navy has under Contract we [Northrop] would have a distinct advantage."

⁴ Moreover, Northrop's pro-competitive justification arguments are irrelevant to an evaluation of a *per se* illegal practice. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

1, 19-20 (1979). It can neither increase economic efficiency nor render markets more competitive. It is, in the words of this Court, "manifestly anticompetitive," *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977), and without "a purpose [other than] stifling . . . competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

Second, Northrop did not *create* the business opportunity for developing and selling F-18's—the Government did. As Northrop acknowledges in its Opposition, it is the Government which determined whether a plane would be procured and who could compete to provide it. (Opposition, pp. 4, 14.)

Third, by the time of the June 27, 1975 Basic Agreement, no agreement to divide the market between McDonnell and Northrop was necessary to bring the F-18 to market. While Northrop had lost the ACF competition to General Dynamics, the Government had selected McDonnell to develop the F-18.⁵

In an attempt to justify its obvious *per se* illegal market division, Northrop asserts that the parties' agreements are licenses, with reasonable use limitations. The agreements, on their faces, are not licenses; they are teaming agreements entered into under DAR 4-117 as Northrop now acknowledges throughout its Opposition.

Moreover, as Northrop admits, the Government purchased "unlimited rights" in all of the data and technology surrounding the YF-17 and F-18 and, as found by *both* the District Court and Ninth Circuit, expressly authorized McDonnell to freely

⁵ Northrop was pursuing foreign sales of a YF-17 derivative designed for land-based operations. It has now been disclosed that it was Northrop's purpose in the Basic Agreement to preclude the F-18 from competing with its YF-17 land-based derivative. As Northrop's F-17 Deputy Program Manager wrote in an internal memorandum dated April 2, 1975: "Northrop-Navy v. MCAIR-Navy in the same market is unacceptable Since, what is good for MCAIR and the Navy may not be in Northrop's best interest, some guidelines are required"

use it. (Finding of Fact 40, App. p. 92a; 705 F.2d at 1036.)⁶ Even if, as Northrop contends, the agreements were residual rights licenses with use limitations, they could not justify the relief sought by Northrop, *i.e.*, to prevent McDonnell from producing and selling any F-18 aircraft which the Government, in the exercise of its "unlimited rights," wants to procure for use by its Air Force or any country to which the Government elects to sell F-18's.

B. Northrop's Claims And Requested Relief Restrict The Government's Unlimited Rights In The F-18 Data And Make The Government An Indispensable Party To This Dispute.

The issue is not, as Northrop disingenuously implies, whether a purchaser of a product is an indispensable party in a suit between suppliers. McDonnell does not contend that simply because the Government is a purchaser of F-18's it is an indispensable party. Rather, *it is the unprecedented claims of Northrop in this action* which make the Government indispensable in this case. *For the first time*, a prime contractor (Northrop) seeks to restrict the Government's use of its "unlimited rights" in the data and technology of an advanced aircraft weapon system (the F-18) by attempting to enjoin or penalize another prime contractor (McDonnell) which relies on the Government's "unlimited rights" in connection with a Government procurement.⁷

⁶ Further, Northrop itself alleges that it provided all assertedly "proprietary" YF-17 data, technology, and know-how to McDonnell under the 1974 Teaming Agreement and prior to the 1975 Basic Agreement. (Amended Complaint, para. 17, App. p. 150a.) On its face, the Teaming Agreement contains no use restrictions (App. pp. 132a-133a). Under Northrop's F-17 proposal prime contract, the Government paid Northrop for the provision of such information directly to McDonnell for its NACF (F-18) proposal. Northrop cannot now convert the subsequent Basic Agreement into a retroactive license of disclosures made without restriction and for which it was paid by the Government.

⁷ Thus, the cases Northrop cites at p. 17 of its Opposition are wholly inapposite. Indeed, none of the cases cited in the first paragraph on

The principal reasons why the Government obtains unlimited rights in data are to carry out its "policies on competitive procurement, subcontracting and component breakout . . ." (DAR 4-117 and 9-504(a)) and "to foster technological progress through wide dissemination of the new and useful information derived from [research and development] work and where practicable to provide competitive opportunities for supplying the new products and utilizing the new processes." (DAR 9-202.1(c) and 9-202.2(b)(2).)* In fact, DAR 4-117, which Northrop acknowledges governs teaming relationships (Opposition, p. 4 n.2), expressly protects the Government's exercise of its unlimited rights and proscribes the market division and other restrictions Northrop now seeks to impose through its construction of the Basic Agreement.

Northrop misleadingly asserts that it "has only requested relief that would prohibit MDC from committing predatory acts prior to receiving an order for F-18 aircraft from a customer" and has requested no relief which would interfere with any Government procurement or the Government's rights (Opposition, p. 19). Its assertion is belied by a simple reading of its Amended Complaint. (See Petition, p. 3.) Contrary to Northrop's assertions, the granting of such relief would immediately prejudice the Government's rights. Since Northrop is attempting to preempt a Government exercise of its rights, the possi-

that page analyzed the issue of indispensability under Rule 19. None of the cases even remotely involved any claims such as Northrop makes here which would restrict the Government's unlimited rights in an advanced aircraft weapons system.

* Contrary to Northrop's incorrect representation that prior to the Basic Agreement all military aircraft have been made available to customers only on a sole source basis (Opposition, p. 6), the Government has procured aircraft from dual and multiple sources (e.g., the B-17 from Boeing Company, Douglas Aircraft Company and Lockheed Corporation; the B-24 from Douglas Aircraft and Consolidated Vultee Corporation; and the B-47 from Boeing, Lockheed and Douglas Aircraft).

bility that the adverse consequences of such prejudice may be prospective is irrelevant.⁹

C. Northrop's So-Called "Private" Dispute Inextricably Involves The Political Question And Act-Of-State Doctrines Which Render The Action Non-Justiciable.

1. Political Question Doctrine

Northrop claims that the adjudication of this dispute would not require the court "to become involved in sensitive political issues" (Opposition, p. 22), and that the District Court based its decision on the "mistaken" belief that Northrop was seeking a declaration stating from whom the Government could procure the F-18. Northrop is guilty of misstatement on both counts. In the District Court it admitted that sensitive political issues are involved,¹⁰ and its own Amended Complaint is irrefutable evidence of the declarations and other relief it is seeking.

That relief would require that the Government procure F-18's and make them available to foreign governments only in accordance with the market division, including customer allocations, which Northrop seeks to establish in this action. Thus, the Judiciary, not the Executive and Legislative Branches, would be making military procurement decisions affecting national defense and foreign policy which are non-

⁹ As Northrop stated in a hearing before the District Court:

[The Court]: Suppose the government came to McDonnell and said we want you to build this airplane in this configuration which is land-based. Do they have a right to do it?

[Northrop's counsel]: I don't believe they have a right to do it.

[The Court]: Aren't they the indispensable party to this litigation?

[Northrop's counsel]: They would be in that event, but that has not happened

¹⁰ As Northrop told the District Court: "We believe as to the United States they will have an interest in this case . . . There is more involved than just money [in this litigation]. I think national security . . . is an interest in this case."

justiciable under the political question doctrine enunciated by this Court in *Baker v. Carr*, 369 U.S. 186 (1962), and *Gilligan v. Morgan*, 413 U.S. 1 (1973).

2. Act-Of-State Doctrine

In its Opposition, Northrop fails to address the conflict between the Second Circuit decision in *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (1977) and the Ninth Circuit's decision in the present case. (See Petition, p. 20-22.) Conspicuously, it fails to mention *Hunt*, which would bar the inquiries necessary to adjudicate the present action.

Northrop argues that the act-of-state doctrine applies only when it would be necessary for a court to determine the "validity of any act of a foreign government," as contrasted with the motivation behind it. This is erroneous. As most recently held by the Ninth Circuit, the case law "does not foreclose application of the act-of-state doctrine to cases where motivation but not validity must be scrutinized." *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983).

It is clear that the adjudication of this case, as pleaded, would necessarily require inquiry into the reasons, motivation and policies underlying the acts of foreign governments. In order to prove the claims which it actually made in its Amended Complaint, Northrop would have to show that McDonnell's alleged acts were the proximate cause of decisions of foreign governments not to purchase F-18's from Northrop.

The Ninth Circuit attempts to avoid the act-of-state doctrine by stating that "The claims relating to the increased costs associated with duplicating technology that McDonnell was allegedly contractually obligated to furnish Northrop will not require the court to inquire into any foreign procurement decisions . . ." (705 F.2d at 1048; Opposition, p. 24.) Northrop made *no such allegation* in its Amended Complaint, either expressly or impliedly, and the Ninth Circuit's and Northrop's reliance on such a non-existent claim is unwarranted.

D. The Government's Overriding Control Of The F-18 Advanced Aircraft Weapons System Precludes A Dangerous Probability Of Success Of Monopolization.

In its Opposition, Northrop mischaracterizes the nature of McDonnell's argument by asserting that McDonnell seeks a sweeping immunity from the antitrust laws for all contractors selling to the Government. This assertion is incorrect.

McDonnell has not contended that the defense industry is exempted from antitrust scrutiny.¹¹ McDonnell maintains only that, by virtue of the absolute control that the Government exercises over all aspects of the production and sale of the F-18 advanced aircraft weapons system,¹² McDonnell cannot possess the market power required for a finding of a dangerous

¹¹ "Exemptions should not be confused with defenses In any antitrust proceeding, the defendant may avoid liability in one of three ways. First, he may rely on the plaintiff's failure to establish all the requisite jurisdictional and substantive elements of the offense charged. Second, he may successfully interpose a statutory or other defense. Third, he may demonstrate that the particular group, industry, or business of which he is a member is exempt. All too often, courts and commentators fail to distinguish exemptions from the first two escape routes." 2 von Kalinowski, *Antitrust Laws and Trade Regulation*. § 7.01[1][b] (Desk ed. 1983).

¹² Northrop contends that although the Government is the sole domestic buyer, it does not determine the identity or number of suppliers and does not exercise control over foreign purchases of U.S. advanced aircraft weapons systems. Northrop is mistaken. As Northrop's Opposition acknowledges, the Government "limited its ACF competition to Northrop and GD." (Opposition, p. 11). Moreover, the Government controls who can sell what weapon systems to foreign customers. For example, as in PD-13 (see Petition, p. 8), the Government has recently promulgated a policy that it will permit only the Northrop F-20 and GD F-16/J79 "export fighters" to be sold to the Gulf States of Bahrain, Kuwait and United Arab Emirates. *Aviation Week & Space Technology*, p. 13, July 25, 1983.

probability of success of monopolization.¹³ Thus, a necessary element of attempted monopolization is lacking.

Northrop also contends the Ninth Circuit panel did not rely on an inference of dangerous probability of successful monopolization in finding that summary judgment was inappropriate on the Section 2 claim. It is clear, however, that its finding of a *prima facie* dangerous probability of success could be supportable only if monopoly power was inferred, since the court cited no evidence of the existence of such power.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to decide the Questions Presented therein. Those Questions should be decided now because of their significance to the established law of *per se* offenses most recently reaffirmed in *Arizona v. Maricopa County Medical Society* and their exceptional importance to national defense and foreign policy.

Respectfully submitted,

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¹³ None of the diverse cases cited by Northrop in its Opposition at p. 26 n.23 involved the factors which control the distinct issue present here.